87-361

Supreme Court, U.S.
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NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1987

ALBERT SLUGOCKI, et al

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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179 pp

QUESTION PRESENTED

I.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, IN REVERSING UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, IMPROPERLY FOUND AND CONCLUDED THAT THE FORMULA USED BY THE OFFICE OF PERSONNEL MANAGEMENT TO DETERMINE FLSA OVERTIME BENEFITS FOR FEDERAL LAW ENFORCEMENT OFFICERS WORKING A REGULARLY SCHEDULED EIGHT HOUR WORKDAY AND FORTY HOUR WORKWEEK DID NOT VIOLATE SECTION 7(A), (D), (E) AND (K) OF THE FAIR LABOR STANDARDS ACT BY ALLOWING OVERTIME PAYMENTS OF LESS THAN THE STATUTORILY MANDATED RATE FOR NON-OVERTIME WORK?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the Petitioner, ALBERT SLUGLOCKI, and the Respondent, UNITED STATES OF AMERICA, the other members of the Plaintiff class listed below were parties to the proceedings in the United States Court of Appeals for the Federal Circuit:

James Miller
Robert Saunders
Malford Duclo
Edward C. Counelis
Bernard Daley
Jack Drazen
Donald Frosht
Roger Gibson
Abel Gilot
Robert Green
Ron Verker
William Leary
William Hickey
William Hunter
Robert Klotzsche
Saunders Kohan
William Luttinger
Cecil Miller
Frank Noe
Ronnie Prekup
William Roberts
William M. Shoemaker, Jr.
James Simmons
Thornton Smith
George Spell
Edison Stout
Juan Torres
James Whitehead
Jim Holt
Gene Rogers
Ricardo Guzman
Charles Rodgers
Joseph Ariel f/k/a
Joseph Goldstein

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Department of Justice Order No. 1551.5 7

The Petitioner, ALBERT SLUGOCKI, putative Plaintiff in the district court prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit, entered in the above-styled case on June 1, 1987. (App. 102)

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida, printed in Appendix A hereto, *infra*, (App. 1-52) and Appendix B hereto, *infra* (App. 53-74) are not reported. The opinion of the Court of Appeals, printed in Appendix E hereto *infra*, (App. 81-98) is reported at ____ F.2d ____ (Fed. Cir. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1987, Appendix F, *infra* (App. 100). A petition for rehearing was filed by the United States of America and decided on June 1, 1987, Appendix G, *infra* (App. 101-102). The jurisdiction of this Court is invoked under 28 U.S.C. §2101(c) and Rule 20, *Rules of the United States Supreme Court.*

STATUTES INVOLVED

The federal statutory provisions involved in 29 U.S.C. §207 are set forth in Appendix H.

STATEMENT OF THE FACTS

This is a class action originally brought by 35 Deputy United States Marshals (hereinafter DUSM) in the Southern District of Florida.[1] The DUSM sought overtime compensation based upon two separate statutory provisions: the Fair Labor Standards Act of 1938 (hereinafter FLSA) as amended, and the Federal Employee Compensation Act (hereinafter FEPA).

The district court found for the Plaintiff class on two of the FLSA claims. Appendices A and B (App. 1-74). In pertinent part, the district court found and concluded that the United States of America violated the Fair Labor Standards Act, as amended, 29 U.S.C. §207, and 29 C.F.R. Part 778, regulations promulgated by the Secretary of Labor, by including administratively uncontrollable overtime (hereafter AUO) in the definition of and when calculating "regular rate of pay." The district court found that by including AUO in calculating "regular rate of pay" for FLSA overtime, the DUSM were being paid less per hour for overtime hours worked than they earned for their basic hourly rate of pay for non-overtime hours based upon the facts of this case. (App. 1-21). A substantial portion of the district court's basis for this finding and conclusion was the concession of the Respondent's own expert witness, Dwight Brown of the Office of Budget and Management. (App. 20; App. 109-112).

The Court of Appeals reversed the District Court, concluding that AUO pay was not a premium rate for

[1]The class size is now reduced to 33 based upon two of the DUSM settling with the United States Department of Justice.

hours worked in excess of a specified daily or weekly standard as defined by 29 C.F.R. §778.202(b) and (d) (App. 94), and that AUO pay was neither a "fixed amount per hour" nor a "multiple of a non-overtime rate." Accordingly, said the Court of Appeals, its decision in *Alexander v. United States*, 1 Cl. Ct. 653 (1983) (Claims Court decision) and *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985) controlled the determination of "regular rate" of pay from which FLSA overtime wages are calculated.[2] (App. 94-95).

REASONS FOR GRANTING THE WRIT

1. First, and foremost, the writ should be granted because the lower court has ignored every decision of this Court addressing the subject of that which must be excluded from computing "regular rate" of pay when determining FLSA overtime. Contrary to what the Court of Appeals concluded, the district court properly found that the formula used by the Office of Budget Management to determine FLSA overtime benefits for federal law enforcement officers working a regularly scheduled 40 hour workweek violated Section 7(k) by allowing overtime payments of less than the statutorily mandated rate for non-overtime work violated the Act. To appreciate the impropriety of the decision of the Court of Appeals the following background of facts is essential.

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[2]The Court of Appeals also cited to *Beebe v. United States*, 640 F.2d 1283 (Ct. Cl. 1981), but that decision merely declared as a proper exercise of authority delegated to the Office of Personnel Management (FPM 551-5) was the regulations upon which Department of Justice Order 1551.5 was issued and that it was proper for an agency to rely on it in implementing the FLSA provisions. *Beebe* did not address the term "regular rate" of pay and the calculations supporting it.

Plaintiffs were DUSMs employed by the United States Marshals Service in the Southern District of Florida. The DUSMs work under the supervision of the United States Marshals Service Headquarters and the Department of Justice.

During the period of time involved, 1971 until October 21, 1978,[3] the vast majority of the DUSMs in the Southern District of Florida were assigned to the Miami Office. The DUSMs regular work week was 40 hours consisting of five eight-hour workdays, Monday through Friday, from 8:30 a.m., until 5:00 p.m. The thirty minutes excess was a lunch break, which was not compensable by the Government under the Federal Employees Act, Title 5, *United States Code,* §5541 *et seq.*, but was compensable under the FLSA as of its effective date, January 1, 1975.

At those times when a DUSM worked beyond his regularly scheduled workweek, the FEPA provides for two separate and distinct forms of compensation for the overtime. For all work in excess of 40 hours that is "officially ordered and approved" and administratively controllable, 5 U.S.C. §5542 authorize time and one-half the statutory rate (a/k/a basic rate) as the multiple for the DUSMs' basic hourly compensation. For hours of overtime which are administratively uncontrollable, 5 U.S.C. §5545(c)(2) provided for premium pay of "not less than 10% nor more than 25% of such part of the rate of basic pay for the position that does not exceed the minimum rate of basic pay for GS-10, by taking into

[3]On this date, the use of AUO pay was discontinued by the Marshals Service. Subsequently, DUSMS were paid for all overtime work at the regularly scheduled overtime rate of time and one-half.

consideration the frequency and duration of irregularly scheduled overtime duty required in the position." This form of compensation until eliminated in October, 1978, was designated "administratively uncontrollable overtime."

In the Southern District of Florida, DUSMs have duties involving seven major functions: (1) serving writs, summons and other papers; (2) morning prisoner pick up for court attendance; (3) prisoner return either in the afternoon or at the end of the day; (4) courtroom duty; (5) prisoner coordination trips; (6) special assignments; and (7) a general category, "other," consisting mainly of protecting witnesses, protecting judges, and jury sequestration supervision. Each DUSM maintains a daily log of hours worked which is turned into the supervisor. The supervisor, based on this information, prepares a USM-6 on a monthly basis, which reflects all work activity for the district.

As a result of an increasing work load and shortage of manpower, the DUSMs were required to regularly work substantial amounts of overtime.[4] From 1971 through 1976 the work load increased at such a rate that it was impossible for the DUSMs to accomplish all the work necessary within the 40 hour week. Additional DUSMs were requested by the United States Marshal. For example, in 1976, the request was for eight more DUSMs than were allowed. One of the results was that the prisoner coordination trips had to be reserved almost exclusively for the weekends and were so scheduled regularly throughout the pertinent period of this case

[4]These factual findings and the ones that follow were made by the District Court. The government did not contest any of these findings.

because the DUSMs could not be diverted from their other duties during regular workweek. In addition, staff meetings occurring almost every Wednesday morning were scheduled outside regular duty hours. For both of these duties, the DUSMs received AUO as compensation.

As of January 1, 1975, DUSMs became eligible for overtime pay under the FLSA.[5] In computing the "regular rate of pay" on which the time and one-half overtime rate was based for FLSA overtime for those DUSMs so qualifying, the service calculated "all remuneration paid to the employee for all work actually performed" divided by the total number of hours actually worked. This method of computation resulted in DUSMs being paid *no more and often less* than their basic rate of pay per hour for non-overtime hours for all hours worked in excess of regularly scheduled workweek. (Appendices H, I and J).

The District Court carefully reviewed the law and regulations as they relate to determining the meaning of "regular rate of pay." Although not having the decision of *Zumerling v. Devine,* 769 F.2d 745 (Fed. Cir. 1985) prior to the entry of its Amended Final Judgment, the District Court's analysis as to the term "regular rate of pay" for purposes of computing FLSA overtime of a DUSM is correct as a matter of law.

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[5]Fair Labor Standards Act (1938), as amended, Public Law Chapter 676 dated June 25, 1938, 52 Stat. 1060, 29 U.S.C. §201 *et seq.*

Once the Fair Labor Standards Act was made applicable to the United States as an employer,[6] DUSMs were to be compensated for hours worked above 40 in two distinct forms, one pursuant to 5 USC (FEPA) and a second under 29 USC (FLSA). 5 U.S.C. §5542 requires time and one-half multiple of the DUSMs basic hourly compensation for work performed in excess of 40 hours per week when the overtime work is administratively controllable and is "officially ordered and approved." When hours above 40 are performed and are not administratively controllable, 5 U.S.C. §5542(c)(2) provides for a percentage increase of between 10% and 25% based upon the number of hours worked. 5 CFR §550.151 and DOJ 1551.5 (App. J). When overtime under FLSA is triggered, 29 USC controls that portion of DUSM's overtime hours and pay.

The two systems of overtime pay under 5 USC are mutually exclusive and DUSMs are compensated for two different kinds of overtime work. While the status does not preclude an employee from receiving regular overtime pay in addition, to AUO, the employee may not claim both for the same work. "Under the terms of this statute, AUO falls clearly outside the scope of regularly scheduled overtime." *Burich v. United States,* 366 F.2d 1984 (Ct. Cl. 1966). It therefore follows that overtime hours under the FLSA are compensated at one rate while AUO hours or regularly scheduled overtime (ROT) hours under Title 5 are calculated based on two entirely different rates.

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[6]29 USC §207(k) covering law enforcement officers became effective 1/1/75. The Marshals argued to the District Court that the effective date of the FLSA as it applied to them was 5/1/74. This argument was rejected by the District Court and that conclusion was not challenged.

In order to establish the overtime rate pursuant to 29 USC (FLSA), it is first necessary to establish and determine the employee's "regular rate of pay." Section 207(d) of the Act provides that the "regular rate of pay" includes all remuneration to the employee except for certain exclusions. The exclusions are set out in 29 U.S.C. 207(d). The Civil Service Commission (OBM) has interpreted this section to mean that AUO pay under 5 U.S.C. §5545(c)(2) is not an exclusion under Section 7(e)(5) of the Act (FPM Letter 551-5, January 15, 1975). The CSC referred to 29 CFR §778.308 and 778.310 as evidence that the regular rate should include AUO pay.[7] The CSC's reliance on these sections is misplaced. The reliance of CSC (OBM) on those sections failed to take into consideration (a) the other more pertinent regulations of 29 CFR Part 778 which is promulgated by the Secretary of Labor whose regulations are paramount and must be adhered to by the CSC (now OBM); (b) clear language from this Court in the cases cited, *infra;* and (c) the legislative history of the FLSA.

The Department of Labor regulations, 29 CFR Part 778 defines "regular rate of pay" and also provides insight into the statutory exclusions in Section 7(e) of

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[7]29 CFR §778.308 and .310 read, in pertinent part, as follows:

> (a) Section 7(a) of the Act requires the payment of overtime compensation for hours worked in excess of the applicable maximum hours standard at a rate not less than one and one-half times the regular rate. The overtime rate, like the regular rate, is rate per hour. Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived, as previously explained, by dividing the total compensation (except statutory exclusions) by the total hours of work for which the payment is made. To qualify as an overtime premium under Section 7(e)(5), (6), or (&), the

the Act. 29 CFR §778.202(b) provides that true overtime premium is to be excluded from the regular rate and credited towards overtime compensation due under the Act. 29 CFR §778.202(d) states that payment at premium rates for hours worked in excess of a specified daily or weekly standard is made pursuant to the requirements of another applicable statute (for example 5 USC §5545[c][2]), *the extra compensation provided by such premium rates will be regarded as a true overtime premium* and therefore excludable from the "regular rate."

The legislative history of FLSA, while not defining "regular rate of pay" does provide instructions "—albeit not precisely on point—" as to what is *not* included for purposes of calculating the statutory overtime rate. Specifica''y excluded is:

(Footnote 7 Continued)

extra compensation for overtime hours must be paid pursuant to a premium rate which is likewise a rate per hour (subject to certain statutory exceptions discussed in §§778.400 through 778.421).

(b) To qualify under Section 7(e)(5), the overtime rate must be greater than the regular rate, either a fixed amount per hour or a multiple of the nonovertime rate, such as one and one-third, one and one-half, or two times that rate.

778.310 Fixed sum for varying amounts of overtime.

A premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even through the amount of money may be equal to or greater than the sum owed on a per-hour basis.

"Premium rates for work on Saturdays, Sundays or holidays or on the sixth or seventh day of the workweek, *where the premium rate is not less than one and one-half the rate established in good faith for like work performed during non-overtime hours on other days,*

"2. Premium rates for work outside the basic, normal or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith . . . *for like work performed during such workday or workweek.*" (emphasis added)

Senate Report No. 402, May 18, 1949; House Report No. 121, February 15, 1949. See 2 *U.S. Code Cong. & Adm. News,* (1949) p. 1617-18. The Senate Report emphasized the fact that the premium rate of one and one-half the bona fide straight time rate applied to like work when performed during the basic, normal or regular workday or workweek. Senate Report at p. 1626-27.

The Act itself states on various occasions that overtime pay shall be "not less than 1½ times the regular rate at which an employee is employed." See Section 207(a), (b), (e), (f) and (h).

This Court has defined "regular rate of pay" within the provisions of Section 7(a) as meaning the hourly rate actually paid for the normal non-overtime workweek. *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 65 S.Ct.

11, 89 L.Ed. 29 (1944); *Madison Avenue Corp. v. Asselta,* 321 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947); *Walling v. Youngerman, Reynolds Hardwood Company,* 325 U.S. 419, 65 S.Ct. 1242, 89 L.Ed. 1705 (1945), *reh. den.,* 326 U.S. 821. An identical definition has been rendered by at least two of the other federal circuit courts of appeals. *See Brennan v. Valley Towing Company, Inc.,* 515 F.2d 100 (9th Cir. 1975); *Wirtz v. Williams,* 369 F.2d 783 (5th Cir. 1966). See also *Brock v. Two R Drilling Company, Inc.,* 772 F.2d 1199 (5th Cir. 1985).

This Court's definition of "regular rate" appears to be based on a fundamental of the FLSA which was to encourage employers to distribute work among a larger work force rather than to work overtime. See *Overnight Motor Transportation v. Missel,* 316 U.S. 572, 577-578, 62 S.Ct. 1216, 86 L.Ed. 682 (1942). The primary means of accomplishing this goal was a requirement in 29 U.S.C. §207(a) that employees be compensated for overtime hours at a rate not less than 1½ the regular compensation. *Marshall v. Hamberg Shirt Corp.,* 577 F.2d 444 (8th Cir. 1978).

In further support of the use of only non-overtime remuneration divided by non-overtime hours when computing "regular rate" of pay, the District Court correctly cited *Walling v. Green Head Bit & Supply Co.,* 138 F.2d 453 (8th Cir. 1943). In *Walling* the employer required an employment contract reducing the employee's overtime rate which had the effect of reducing the "regular rate" plus the time and one-half overtime to the same level as the regular rate for non-overtime hours. The *Walling* Court found the agreement to violate the Act. Including AUO pay and hours in

calculating "regular rate of pay" of the DUSMs in this case produced the same result condemned in *Walling v. Green Head Bit & Supply Co., supra*: overtime pay at a rate per hour not more than the rate per hour for non-overtime work during the regular workweek. See App. 81-84.

In *Wirtz v. Williams,* 369 F.2d 783, 785 (5th Cir. 1966), "regular rate of pay" was determined by dividing the wages actually paid for non-overtime work by the total non-overtime hours actually worked. That court also defined "regular rate" as the hourly rate paid for the non-overtime work. Such clear decisional language by this Court and the other Circuit Courts of Appeal, *op. cit.,* although leaving no room to doubt, nevertheless went unheeded by the lower court.[8]

Moreover, premium rates, to be excludable, in computing "regular rate" of pay under the FLSA must be true time and one-half rates or rates equal to time

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[8]Other circuit court decisions are equally clear and in conflict with the decision below. In *Brock v. Two (R) Drilling Company, Inc., supra,* the court found that employees who worked 84 hours in any week received an incentive for working those extra hours. "So long as it was possible to conclude from the evidence that the higher pay for after work hours was conceived by the company and perceived by the employees as a reward for putting in hours beyond the established workweek (of 40 hours) for work similar to that during the regular week, such compensation could be characterized as an overtime premium." *Id,* 772 F.2d at 1202. Therefore, the extra compensation, while being creditable toward overtime compensation, is not to be included in determining the "regular rate of pay." *Brennan v. Valley Towing Co., Inc.,* 515 F.2d at 107. See also *Pezzillo v. General Telephone, etc.,* 572 F.2d 1189 (6th Cir. 1978) for regularly scheduled work hours.

and one-half the true non-overtime pay rate.[9] Indeed, as found by the District Court, any other interpretation of the excludable premium payments listed in Section 7(e)(5)-(7) of the Act (29 U.S.C. 207(e)(5)-(7) would do violence to the treatment of the overtime rate as a penalty imposed on employers for requiring employees to work overtime within the Act's coverage, another fundamental of the FLSA.

Finally, AUO (5 USC 5545[c][2] is extra compensation paid at a "premium rate" for excess hours worked beyond a DUSM's scheduled work day (of 8 hours) or workweek for his normal or regular working hours (40 in each week). Depending on the number of overtime hours a DUSM averages during the *eligibility* period, the DUSM receives as this premium rate of extra compensation in the *next pay period* a varying amount of money ranging anywhere from 10% to 25% of the base pay of a DUSM, not to exceed the base pay of a GS-10, step one employee. Although this extra compensation is less than 1½ times the employee's regular rate of compensation for non-overtime hours, 5 USC §5545(c)(2) defines AUO as a premium rate of pay for a (certain type) of overtime work. "Premium rate of pay" under 5 USC §5545 (c)(2) and 29 USC §207(e)(5) are defined identically and must be treated identically in calculating "regular rate of pay" for FLSA overtime. See 29 CFR §778.202(d).

2. The second reason the writ should issue is based upon the lower court's reliance on *Zumerling v. Devine, supra,* and that decision's failure to even address facts present *sub judice*: the AUO included in "regular rate

[9]These rates are properly excludable so that the employer does not pay an overtime rate on top of an overtime rate.

of pay" was paid to the DUSM for overtime work outside their regularly scheduled 8 hour day or 40 hour workweek.

In *Zumerling*, a panel of the Court of Appeals for the Federal Circuit found that the Civil Service Commission had the authority to administer the provisions of the FLSA as long as such administration was consistent within the meaning, scope, and application established by the Secretary of Labor which are applicable to all other sectors of the economy, *Zumerling v. Devine*, 769 F.2d at 750. Petitioners recognize that a panel of that court concluded that OBM's regulations are consistent with those of the Department of Labor in finding that the "regular rate of pay" of firefighters who have a regularly scheduled tour of duty of 144 hours in a two week period was determined by dividing total remuneration received by the total number of hours on duty. *Id* at 752.

But the facts in *Zumerling* are inapposite to those at bar and applying the *Zumerling* conclusion to the facts of this case would contravene *all* other published law addressing the term "regular rate of pay" under the FLSA. Firefighters do receive pay under 5 USC 5545 which is *not* AUO because the 144 hour scheduled tour of duty, by definition, includes no overtime under 5 USC. Additionally their pay includes stand-by-time. The DUSMs in this case work regularly scheduled work days of 8 hours each day, 40 hours each workweek. The *Zumerling* court did note, in regard to law enforcement officers, that the decision in *Alexander v. United States*, 1 Ct.Cl. 653 (1983), was consistent with its findings. However, the Claims Court in *Alexander* based its findings on FPM 551-5 and Department of Labor regulations found at 29 CFR 778.308 and 778.310, the

same sections of the regulations that the District Court below found to be inappropriate due to the concise language in 778.202(b) and (d). The issues before the Court *now* concerning "regular rate of pay" for DUSMs has never been fully reviewed.

Other than *Zumerling,* all cases which have addressed the issue of "regular rate of pay" consistently refer to the limitation of using non-overtime remuneration divided by non-overtime hours as the method to determine the hourly rate in order to calculate "regular rate of pay" for FLSA overtime. And if this Court leaves *Zumerling vs. Devine* to stand as controlling authority for federal employees working overtime hours, the court would allow a segment of the nation's work force as the only such segment which is paid an overtime rate per hour for overtime work under the FLSA of no more than and mostly less than their rate per hour for non overtime work during their regularly scheduled work week. Such an anomaly has not been tolerated by this Court or the Congress of the United States since the passage of the FLSA in 1938.[10]

The evil which has been condoned by the decision below is plain. The Petitioner seeks no more than fundamental fairness in the application of the mandate of this Court in its interpretation of the Fair Labor Standards Act as this Court itself would render. No less is expected within the federal process. Because of the error as outlined above and the reasons for granting this writ, this petition is deserving of review by this Court.

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[10]Indeed, Congress expressly rejected the objections of the Civil Service Commission (now OBM) to include the federal employee work force within the ambit of the FLSA in its 1974 amendment to the Act.

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted by this Court.

Respectfully submitted,

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and
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BY _____
L. MARK DACHS, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 28th day of August, 1987 to: Solicitor General of the United States, Department of Justice Building, Washington, D.C. 20530.

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Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO: 77-1242-CIV-WMH

ALBERT SLUGOCKI, etc., et al.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION WITH FINDINGS OF FACTS AND CONCLUSIONS OF LAW

INTRODUCTION

In one of the first of numerous similar lawsuits filed throughout the country by aggrieved Deputy United States Marshals, this is a class action brought by thirty-five Deputy United States Marshals (hereinafter "DUSM's") for overtime compensation claimed to be justified by two separate statutory provisions: the (a) Fair Labor Standards Act of 1938,[1] as amended, and (b) Federal Employee Compensation Act, and certain related statutes. The case was tried, without a jury, on several settings. For organizational purposes, the Plaintiffs' proofs and legal arguments throughout the prolonged trial proceedings were divided into the two

statutory schemes, correspondingly naming each series of claims based upon the statutory scheme to which the Court must direct its attention.

THE PLAINTIFFS' FAIR LABOR STANDARDS ACT CLAIM(S)

In their Fair Labor Standards Act[2] claim, the plaintiffs advanced six complaints. They included:

1. The defendant willfully violated the Fair Labor Standards Act (hereinafter "the Act") by the following tardy payments of FLSA overtime which was:

(a) retroactively owed between January 1, 1975 and April, 1977, the latter date being that on which the defendant made its first payment of overtime owed pursuant to the Act; and

(b) currently owed to DUSM's

2. That all of the regulations, directives or orders promulgated by the Civil Service Commission[3] and the Department of Justice allegedly pursuant to the Act are void. In the alternative to the foregoing, all regulations, directives or orders by those governmental bodies which are inconsistent with the Act or the regulations promulgated by the Secretary of Labor (Title 29, Code of Federal Regulations ["CFR"] are void.

3. That the defendant violated the Act and 29 CFR when it "regulated" the definition of "regular rate of pay" of DUSM's to include administratively uncontrollable overtime premium pay ("AUO" pay) paid to and AUO hours worked by DUSM's.

4. That the defendant violated the Act when it failed (and fails) to include and consider standby duty at 24 hours per day as part of the DUSM's "tour of duty" within each pay period to determine if FLSA overtime is triggered and owing to any particular DUSM.

5. That the defendant violated (and violates) the Act by deducting "leave time" taken by DUSM within an FLSA pay period before that DUSM is deemed to have triggered FLSA overtime.

6. That the defendant violated and continues to violate the Act by delaying FLSA overtime payments until the second pay period following the pay period in which FLSA overtime is worked by a DUSM. Each of these six complaints will be addressed at length separately below. The Court finds for the plaintiff class on two of the six allegations, numbered 1(a), 1(b) and 3 above, and will address each in detail below.

A. The Defendant's Willful Tardy Payment for FLSA Overtime.

This complaint is the easiest for the Court to resolve from both a factual and legal standpoint. The pertinent facts essentially are these.

The Act was amended in 1974 placing most government employees within the Act's coverage effective May 1, 1974, and rendering the employment and payment of "law enforcement"[4] personnel also subject to the Act effective January 1, 1975. As early

as May, 1974, the defendant's responsible persons with the Department of Justice conferred on several occasions concerning the 1974 amendment to the Act and its application to Department's personnel. (Deposition of Bernard Neaton, PX 18, p. 18). Despite the Department's full knowledge of the Act's amendment and its requirement to pay FLSA overtime to federal employees, including, "law enforcement" personnel, the first "current payment" of FLSA overtime to DUSM's in the Southern District of Florida was not accomplished until January, 1977 (Deposition Mary Nugent, PX 19, p. 27-28; Deposition Bernard Neaton, PX 18, p. 57; PX 10), some two years after the effective date of the amendment. The retroactive payments to the DUSM's for all FLSA overtime earned between the date the Act applied to DUSM's and the first pay period for 1977 was not accomplished until April 7, 1978 (Deposition Bernard Neaton, PX 18, p. 12; Deposition Mary Nugent, PX 19, p. 47; PX 10), some three years and 4 months following the effective date of the amendment.[5]

Before the Court can determine the exact measure of the delay permitted by the Department of Justice in making either current (January, 1977) or retroactive (April 7, 1978) FLSA overtime payments, the point in time at which DUSM's became covered by the Act must first be resolved. The Government urges that the Act's effective date was January 1, 1975, since DUSM's are "law enforcement" personnel within its meaning. Relying on an interpretation by the Civil Service Commission, Mr. Bernard Neaton, the Justice Department's Chief of the Fiscal Applications Unit, Employee Data Services, Central Management System Staff, Office of Management and Finance, concluded

that the Act applied to DUSM's effective January 1, 1975. (Deposition Bernard Neaton, PX 18, pp. 19, 23, 25) Mr. Neaton's supervisor, Ms. Mary Nugent, of the Justice Department's Central Management Services Staff, never challenged that conclusion. (Depo. Mary Nugent, PX 19, p. 26).

On the other hand, the plaintiffs contend that the Act applied to them effective May 1, 1974. They take this position contending that DUSM's are not primarily "law enforcement" personnel; and that "law enforcement" is only the secondary responsibility of DUSM's. The plaintiffs cite the definitions contained in the Attorney General's Annual Report and an analysis of their job functions to support their theory. (PX 121, pp. 105-108) The Court finds that in fact DUSM's are "law enforcement personnel" within the meaning of the Act and, therefore, came within the Act's purview on January 1, 1975.

The Service is divided into six divisions: Administrative Services Division, Personnel Management and Training Division, Special Operations Division, Witness Security Division, Court Support Division and the General Operations Division (PX 121, pp. 105-108) The first two Divisions' responsibility, plaintiffs contend, do not include typical law enforcement efforts. Special operations efforts can be either law enforcement or security assistance. (*Id.* p. 107) The same would apply to the Court Support Division efforts. (*Id.* p. 106) Plaintiffs further argue that the Witness Security Division and General Operation's Division involve non-law enforcement activities and that the one work function in these divisions that may

be defined as law enforcement is the investigation and execution of warrants. (See *id.* p. 105-106).

In the Annual Report of the Attorney General both the Justice Department itself and the Director of its division, the United States Marshals Service, noted as recently as 1977 that DUSM's serve as both officers of the federal courts and law enforcement agents of the Attorney General. (*Id.* at p. 105) Support of the federal judicial system comprises most of the overtime work generating the compensation disputes which are the subject of these proceedings: (a) service of process, (b) execution of warrants, (c) the retention in custody and transport of federal prisoners, (d) providing security for federal court buildings, property and judicial officers. Indeed, efforts supporting the federal judicial system by virtue of security or security assistance alone consume one-third (1/3) of the Marshal Services' personnel. (*Id.* p. 106) This support work appears to be more law enforcement than non-law enforcement work.

For the Civil Service Commission to conclude, therefore, that the Marshal's Service efforts were, by definition, solely or principally within the definition of "law enforcement" within the meaning of Section 7k of the Act (29 USC Section 207(k) was not arbitrary and capricious, since it was consistent with the Service's own work definitions, job descriptions and actual work functions.[6]

Regardless of the date on which DUSM's were covered by the Act, the delay until January, 1977, before paying current FLSA overtime and April 7, 1978, before paying retroactive FLSA overtime, as well as the

Department's conduct during the delay was willful in both fact and law. It cannot be said to have been done in "good faith," as the defendant asserts. See *Coleman v. Jiffy June Farms* and *Hays v. Republic Steel Corp., both infra.*

The Department's first staff meetings concerning the Act and its application to its personnel were held in May, 1974. (PX 18, p. 19) The Department's section or office responsible for payroll assigned only one individual to work on the applicability of the Act, Mr. Peter Trawicki. Mr. Trawicki was to develop specifications for the programming staff. (PX 18, p. 18-19; 23) Although Mr. Trawicki's resignation in July, 1975 "surprised" the responsible supervisor (PX 18, p. 28), the office suffered from chronic manpower shortages (PX 19, pp. 17-26, 29) which were so severe that supervisory level personnel, Mr. Neaton and Ms. Nugent, had to personally work on the FLSA programming and do so in the evenings and over weekends. (PX 19, pp. 68-69) The Center's greatest priority was continuously limited to keeping up with the Department's bi-weekly payroll. (PX 19, p. 31) This preoccupation with the bi-weekly payroll was despite the fact that when Ms. Nugent was interviewed for her position as supervisor to Mr. Neaton in the spring of 1975, before Mr. Trawicki's departure, she discussed with her supervisor one of the principal items of work which had to be addressed, namely programming the applicability of the Act to the Department's personnel, including the Marshal's Service.[7] (PX. 19, p. 17) In spite of the fact that Ms. Nugent regularly advised her supervisors of the manpower deficiency (PX 19, pp. 32-33) and its detrimental effect on implementing the

FLSA overtime payment requirements (PX 19, pp. 34-35; 82), she received no additional support. Ms. Nugent's concern was based on her knowledge of the Act's requirements and intent: the prompt payment of overtime earned (PX 19, p. 40). Ms. Nugent's concerns, however, received only formalistic acceptance from those to whom she reported, the equivalent of a Deputy Assistant Attorney General. Ms. Nugent's supervisor would only remark that based on ". . . the resources that we were assigned things were going pretty well . . ." (PX 19, p. 82-83).[8]

The Department's payroll support center suffering from the chronic ". . . too few bodies authorized for the amount of work that had to be done . . ." (PX 19, p. 62),[9] combined with the highest echelons of its management being unmindful of the time lapsing from the Act's effective date are primarily responsible for what appears to be extensive, constructively willful delay in FLSA overtime payments. Throughout the two year (current FLSA overtime payments) to 3⅓ years (retroactive FLSA overtime payments) delay FLSA overtime was paid on manual computations when the Department was faced with threats or actual litigation. (PX 19, p. 74-75, PX 12; PX 6) Only the Department's reluctance to properly address the people problem and unconcern with the delay prevented staffing the payroll center with extra personnel to manually compute FLSA overtime until the computer programming was complete and the necessary data collected, since a manual computation program was completed as early as February 6, 1976.[10]

It seems clear that the Department actually knew the Act applied to its personnel, including DUSM's. Assuming without conceding that sufficiently high levels of management in the Justice Department did not have actual knowledge of the Act's coverage over DUSM's, the circumstances were seemingly such as to justify the conclusions that all levels of management in the Department should have known the Act applied to overtime payments to DUSM's no later than January 1, 1975. This reasonable man objective standard is all the plaintiffs need satisfy to demonstrate a willful violation of the Act. *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 458 F.2d 1139, *cert. denied.* 409 U.S. 948 (1972); *Brennan v. J. M. Fields, Inc.*, 488 F.2d 443, 448 (5th Cir. 1973); *Brennan v. Heard,* 491 F.2d 1; (5th Cir. 1974); *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976). A violation of the Act is willful even in the absence of bad intent. *Coleman v. Jiffy June Farms, Brennan v. J. M. Fields, Inc., Brannan v. Heard,* all *supra.* So long as an act is intentionally and knowingly done, with awareness that there may be complications under the wage act, then there is a willful violation of the Act if the conduct contravened the Act. *Hays v. Republic Steel Corp., supra.*

I am persuaded to the conclusion that the Department willfully violated the Act each regular pay day covering the pay period in which the FLSA overtime accrued and was not paid. *Walling v. Harnischfeger Corp.*, 375 U.S. 427, 65 S.Ct. 1246, 89 L.Ed. 1711 (1945); *Keen v. Mid-Continent Petroleum Corp.*, 63 F.Supp. 120 (D. Iowa 1945), *affirmed* 157 F.2d 310 (8th Cir. 1945); *Reid v. Solar Corp.*, 69 F.Supp. 625 (D. Iowa, 1946); *Rigopoulos v. Kervan,* 140 F.2d 506 (2nd Cir. 1943);

United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487 (2nd Cir. 1960).[11] Even if the Act does not mandate FLSA overtime payments on the next regular pay day covering the pay period in which the overtime accrued,[12] the extraordinary delay evidenced here produced imprompt payment of the retroactive overtime in violation of the Act.

The plaintiffs lastly contend that the Department's continuous practice of paying FLSA overtime on the second regular pay day following the pay period in which the overtime accrues violates the Act's mandate of prompt payment and should be enjoined. The Court disagrees, instead finding that the two pay period delay in making current FLSA overtime payments does not violate the Act. This is due to the myriad of factors with which the defendant's Payroll Center must contend in computing processing and calculating pay to the DUSM's under the two distinct pay statutes here involved.

The Department's asserted "good faith" defense to this portion of the Plaintiff's FLSA claim(s) appears to be without merit. The Court must, at some point, address the question of the liquidated damages and attorney's fees plaintiffs have requested. Act, *supra*, Section 16 (29 USC Section 216); *Walling, Keen, Reid, Rigopoulos* and *Klinghoffer Bros., etc.*, all *supra*. Section 11 of the Act (29 U.S.C. Section 211) permits a District Court to relieve a violator of the liquidated damages penalty if the violator satisfies a burden placed on him of meeting a two-prong test: (a) that he acted in good faith and (b) that he had reasonable grounds to believe that the act or omission complained of did not violate

the Act. The Department cannot claim that it satisfies either of these requirements. The applicability of the Act was both manifest and actually known to the responsible supervisors. This exceeds the legal test. See, *Coleman v. Jiffy June Farms, supra.* The Act's intent and requirement of prompt payment of overtime wages was also known. (PX 18, PX 19). To allow the government agency charged with the responsibility of enforcing the laws of the United States generally and the criminal sanctions for severe violations of the Act, see for example, *United States v. Klinghoffer Bros. Realty Corp., supra,* to ignore the Congressional mandate of prompt payment of FLSA overtime payments would be to establish a dangerous precedent. However, I will reserve final decision on the good faith issue until after damages are determined.

B. **The Pay Regulations Violate the Fair Labor Standards Act.**

This complaint concerns Section 7(e) of the Act [29 USC 207(e)]. The plaintiffs contend and the Court so finds that the Civil Service Commission and the Department of Justice violated the Act when they construed the definition of "regular rate of pay" of DUSM's to include administratively uncontrollable overtime premium pay ("AUO" pay) paid to and AUO hours worked by DUSM's in calculating "regular rate of pay" for FLSA overtime purposes.

The regulations promulgated by the Civil Service Commission required that in calculating FLSA overtime payments, a DUSM's "regular rate of pay" must include ". . . all remuneration paid to the employee for all

work actually performed" and that total then be divided by the total number of hours actually worked, except for certain statutory exclusions. (FPM Letter No. 551-5 and its attachment 5) This, in essence, was a ruling that AUO premium pay received for overtime hours worked under 5 USC 5545(c)(2) was not an exclusion under Section (7)(e) of the Act. It is this ruling that the Court concludes violated the Act.

Prior to the Commission's promulgation of this rule, the Department of Justice interpreted Section 7(e) of the Act [29 USC 207(e)] as meaning that "regular rate of pay" calculations should exclude AUO pay received and hours worked because AUO was an exclusion under Section 7(e)(5) [29 USC 207(e)(5)]. As early as March 15, 1976, the Department of Justice referenced the Section 7(e)(5) [29 USC 207(e)(5)] exclusion in a letter to the Civil Service Commission. The letter questioned the Commission's regulatory definition which included AUO paid and hours worked in determining "regular rate of pay" for FLSA overtime purposes. The Department's letter questioned the Commission's regulation because AUO: (a) by definition was not pay for "scheduled" duty and (b) was a premium pay for overtime work.[13]

On March 31, 1976, the Civil Service Commission replied that its earlier definition of "regular rate of pay" properly included AUO pay and hours worked. The Commission justified its "ruling" by reference to regulations promulgated by the Secretary of Labor, 29 CFR Section 778.308 and 778.310 which state respectively:

"778.308

The overtime rate is an hourly rate.
(a) Section 7(a) of the Act requires the payment of overtime compensation for hours worked in excess of the applicable maximum hours standard at a rate not less than one and one-half times the regular rate. The overtime rate, like the regular rate, is a rate per hour. Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived, as previously explained, by dividing the total compensation (except statutory exclusions) by the total hours of work for which the payment is made. To qualify as an overtime premium under Section 7(e)(5),(6), or (7), the extra compensation for overtime hours must be paid pursuant to a premium rate which is likewise a rate per hour (subject to certain statutory exceptions discussed in §§778.400 through 778.421.)

(b) To qualify under Section 7(e)(5), the overtime rate must be greater than the regular rate, either a fixed amount per hour or a multiple of the non-overtime rate, such as one and one-third, one and one-half, or two times that rate. To qualify under Section 7(e)(6) or (7), the overtime rate may not be less than one and one-half times the bona fide rate established in good faith for like work performed during non-overtime hours. Thus, it may not be less than time and one-half but it may be more. It

may be a standard multiple greater than one and one-half (for example, double time); or it may be a fixed sum of money per hour which is, as an arithimetical fact, at least one and one-half times the non-overtime rate (for example, if the non-overtime rate is $2 per hour, the overtime rate may not be less than $3 but may be set higher arbitrary figure such as $3.20 per hour)."

and

"778.310

Fixed sum for varying amounts of overtime.

A premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money may be equal to or greater than the sum owed on a per-hour basis. For example, an agreement that provides for the payment of a flat sum of $30 to employees who work on Sunday does not provide a premium which will qualify as an overtime premium, even though the employee's straight time rate is $2 an hour and the employee always works less than 10 hours on Sunday. Likewise, where an agreement provides for the payment for work on Sunday of either the flat sum of $30 or time and one-half the employee's regular rate for all

hours worked on Sunday, whichever is greater, the $30 guaranteed payment is not an overtime premium. The reason for this is clear. If the rule were otherwise, an employer desiring to pay an employee a fixed salary regardless of the number of hours worked in excess of the applicable maximum hous standard could merely label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked. The Congressional purpose to effectuate a maximum hours standard by placing a penalty upon the performance of excessive overtime work would thus be defeated. For this reason, where extra compensation is paid in the form of a lump sum for work performed in overtime hours, it must be included in the regular rate of and may not be credited against statutory overtime compensation due.

The Commission's report to Section 778.308 and 778.310 missed the point entirely and ignored the fundamental intent and language of the Act, which was to provide an overtime rate of pay, calculable to some hourly rate, of at least a multiple of one and one-half times an employees regular rate of pay, on an hourly basis for his regularly scheduled work.

1. **The Statutory Language.**

Section 7 of the Act (29 USC 207) repeatedly states throughout its various subdivisions that overtime pay under the Act shall be "not less than one and one-half

times the *regular rate at which (an employee) is employed.*" See Section 7(a), (b), (e), (f) and (h) [29 USC 207(a), (b), (e), (f) and (h)].[14] Indeed, the Act even mandates for FLSA overtime payments to equal a multiple of not less than one and one-half time the rate of pay for non-overtime piece work (Section 7(b)(1); 29 USC 207 7(f)(1). This multiple of at least one and one-half "*the regular rate of rate at which* (an employee) *is employed . . .*" is based upon language also repeatedly observed in the Act's legislative history.

The legislative history to the 1949 amendment begins to explain the definition of the term "regular rate of pay."[15] The history concedes that the original act failed to define "regular rate of pay" and that the amendment provided only a ". . . partial definition of 'regular rate' of pay . . . ." 2 *U.S. Code Cong. & Adm. News,* (1949), p. 1617-1618. This partial definition actually described what would not be included in "regular rate of pay" for purposes of calculating statutory overtime. Excluded was:

> "1. Premium rates for work on Saturdays, Sundays, or holidays or on the sixth or seventh day of the work week, *where the premium rate is not less than one and one-half the rate established in good faith for like work performed during non-overtime hours on other days,*
>
> "2. Premium rates for work outside the basic, normal or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours)

established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith . . . *for like work performed during such workday or workweek.*" (emphasis added)

Id. The foregoing language was later analyzed in the Senate Report thusly at p. 1626-27:

"The effect of the amendment made by paragraph (1) of Section 1 of the bill may be illustrated by reference to an employee who is paid for work on Saturday, Sundays and holidays *at a premium rate which is at least one and one-half times the bona fide rate for like work performed during non-overtime hours on other days.* Typical of such arrangements is that before the Court in the Bay Ridge case where work on Saturday afternoon, Sundays and holidays was considered overtime and was paid for at a premium rate of one and one-half times the *straight-time rates established in good faith for like work performed during non-overtime hours.* The extra compensation for such work provided by the premium rate will under the amendment, be excluded in computing his regular rate of pay and may be credited toward overtime compensation required by Section 7 of the Act." (emphasis added)

Paragraph (2) was analyzed in a similar manner, namely,

". . . (w)ork outside such workday and workweek is paid for on both coasts at a premium rate *not less than one and one-half times the bona fide straight-time rates applicable to like work when performed during the basic, normal or regular workday or workweek.* (emphasis added)

Patent from the foregoing are two things: first, that Congress' mandate and intent was to require that overtime premium pay be not less than one and one-half times that which the employee was receiving for his or her *bona fide wages for the non-overtime workweek*; and second, that in determining the employees "regular rate of pay" only the total remuneration paid for an employee for non-overtime work hours would be considered in the calculation. Efforts by regulation or interpretation of regulation to diminish what is clearly "overtime" in the strict sense should be viewed most cautiously. Unless it clearly appears from congressional intent that the legislators intended to attenuate the basic purpose for overtime payments, effort to do so should be rejected.

The above conclusions are fully substantiated by the court decisions interpreting Section 7(a) of the Act [29 USC 207(a)] both before and after the 1949 amendments. *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 65 S.Ct. 11, 89 L.Ed. 29 (1944); *Madison Avenue Corp. v. Asselta,* 321 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947); *Walling v. Youngerman Reynolds Hardwood Co.,* 325 U.S. 419, 65 S.Ct. 1242, 89 L.Ed. 1705 (1945), *rehearing denied,* 326 U.S. 821 [the word "regular rate" within the overtime provisions of Section 7(a) means the hourly

rate actually paid for the normal, non-overtime work week]. See also, *Walling v. Garlock Packing Co.*, 159 F.2d 44 (2nd Cir. 1947), *cert. denied* 321 U.S. 820; *Wirtz v. Williams*, 369 F.2d 783 (5th Cir. 1966); *Mumbower v. Callicott*, 526 F. 2d 1183 (8th Cir. 1975); *Masters v. Maryland Management Co., supra.* See also, *Barke v. Mesta Machine Co.*, 79 F.Supp. 588 (E.D. Pa. 1948).

The foregoing definition of regular rate of pay:—the actual wages received during the non-overtime hours divided by the number of hours in the scheduled workweek—is reinforced by those appellate decisions which addressed the question of the propriety of contractual schemes designed by employers to circumvent the Act. In *Walling v. Green Head Bit & Supply Co.*, 138 F.2d 453 (8th Cir. 1943) the employer induced employees into employment contracts which specified that when an employee worked overtime his "rate of pay" during the overtime hours would decrease to a level so that the reduced "regular rate of pay" plus the time and one-half overtime rate would average the same as the regular rate for non-overtime hours. The court declared the contract in violation of the Act because it was an agreement to pay straight time regardless of the time worked.

If the AUO pay and hours were allowed to remain in the computations for determining "regular rate of pay" the same result condemned in *Walling v. Green Head Bit & Supply Co., supra,* would be judicially sanctioned to continue. Professor McClave testified for the plaintiffs that by computing "regular rate" with AUO pay received and hours worked normally resulted in overall pay to the DUSM's for overtime hours worked

equalling no more than their basic rate of pay (wages) per hour statutorily authorized for the regularly scheduled workweek. Dwight Brown, of the Office of Budget and Management called as an expert by the Government, conceded this point.

The overtime premium rates which may be excluded from calculating regular rate of pay are true time and one-half rates or rates equal to time and one-half the bona fide non-overtime pay rate. The reason such premium rates are excludable is to avoid requiring an employer to pay overtime on top of overtime. See Senate Report No. 402, *supra,* pp. 1618-19. Any other interpretation of the excludable premiums listed in Section 7(e)(5)-(7) of the Act [29 USC 207(e)(5)-(7)] would do violence to the Act's treatment of the overtime rate as a penalty imposed on employers for requiring employees to work overtime within the Act's coverage. See House Report No. 93-913, *supra,* p. 2815; *Carleton Screw Products Co., v. Fleming,* 126 F.2d 537 (10th Cir. 1942), *cert. denied* 317 U.S. 634, 63 S.Ct. 54, 87 L.Ed. 511.

Indeed although the Act and its legislative history never addresed the concept of AUO as established in 5 USC 5545(c)(2) in 1955, AUO pay and hours qualified for exclusion when calculating "regular rate of pay" based upon the Act viewed in its entirety. Unless AUO pay received and hours worked are excluded in calculating "regular rate of Pay" for FLSA overtime, the DUSM's could be paid less per hour for overtime hours worked than they earn per hour for each of the regularly scheduled hours of work in their regular work week. This the Act forbids.

Accordingly, whether based on the well reasoned analysis of the decisional law which addressed the term "regular rate of pay" well before the Act's 1974 amendment brought law enforcement federal employees within its purview, or the comparison and analysis of 5 USC 5545(c)(2) with 29 USC 207(e)(5), and 29 CFR 778.202(d), AUO was never properly includable in the calculation of "regular rate of pay" for determining the rate which is then multiplied by one and one-half for the overtime rate. The Civil Service Commission's regulation requiring the inclusion of AUO pay and hours in the computation was arbitrary, violating well established and well reasoned judicial decisions as well as the plain language and intent of the Act. FLSA overtime shall be recalculated consistent with this order. Liquidated damages equalling the difference between what should have been and what was paid, attorney's fees and pre-judgment interest are, therefore, appropriate and hereby ordered.

C. **The Stand-By Duty.**

The plaintiffs' next urged that the Department of Justice violated the Act when it failed to include stand-by duty at 24 hours per day as part of the Deputy Marshal's "tour of duty" within each pay period to determine if and how much FLSA overtime was worked and is, therefore, owed. The Court disagrees and instead finds for the Government on this issue.

The period of time which is the subject of this proceeding is April, 1971 through April, 1977. In this time frame, the Marshal's office for the district regularly scheduled the deputies to a week long duty watch from

Friday afternoon to the next Friday afternoon. This scheduling was in advance and in writing. When assigned to this stand-by duty watch, a deputy marshal would report to work for his regularly scheduled workday each morning and devote those days to directing the cell block office for the duration of the day. Following the regularly scheduled workday the deputy would travel to his residence and there maintain himself in a ready status to immediately respond to any calls requiring his presence on the scene or official reaction via telephone. In the early portion of the pertinent time period, April, 1971, until early August, 1971, the Marshal's Office employed an answering service to relay messages. This was replaced by a short range beeper device to contact the DUSM on watch duty. After early August, 1971, the office employed a more efficient and longer range beeper, one having a range of about 25 miles.

Plaintiffs presented evidence to demonstrate the "readiness" which the DUSM's had to maintain during the duty period. Night work and jail activity might be necessary with consequent paper work. Plaintiffs argue that defendants directives, instructions, or guidelines for compensation (set forth below) raise questions of arbitrariness in definition and interpretation.

> "An employee is on stand-by duty outside his regular working hours only when he is required to remain at his place of employment or residence and is required to hold himself in a state of readiness to answer calls for his service."

The pertinent regulations or guidelines continue to define this stand-by duty by emphasizing the location or whereabouts to which the DUSM is restricted by the following language:

> ". . . This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject to call outside his tour of duty but may leave his office or home provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required.***"

The government's directives or guidelines are not arbitrary and capricious even in the face of the broad coverage Congress intended for the Act. See, *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161 (1944).

The Act defines "employ" as follows, "to suffer or permit to work." [Act, *supra* §3(g); 29 USCA 203(g)] The Act's concept and definition of work has been interpreted to include "idle" or "stand-by" time, depending on circumstances. *Armour & Company v. Wantock*, 323 U.S. 126, 65 S.Ct. 165 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161 (1944). Exactly what is or is not stand-by duty is a question of fact to be resolved by the Court based on all the circumstances *Skidmore v. Swift & Co., supra*; *Armour & Company v. Wantock, supra*; *Marshall v. Partida*, 613 F.2d 1360 (5th Cir. 1960). The criteria which this court must address in resolving this factual question have been announced in decisions both predating and postdating *Armour & Company v. Mantock*, and *Skidmore v. Swift*

& Co., both *supra*, and deal with diverse job descriptions ranging from nurses and doctors having "officer of the day" responsibilities, to oil well pumpers, logging camp workers and police officers. The attitudes of the courts have not been consistent and there is no case directly on point.

The Court further finds that the average number of calls to work occurring between 5:00 p.m., to 8:00 a.m., on weekdays and throughout the weekends and holidays limited somewhat but not substantially the distance from home a DUSM having the duty could travel, and the responsibility with which the duty DUSM is charged during the non-regular workday hours were not of such a nature or degree as to render the stand-by time working time.

In spite of the various duties which the DUSM's were called upon to perform in such status, the DUSM was substantially more "waiting to work" than not. See, for example, *Rapp v. United States*, 340 F.2d 635 (Ct. Cl. 1964).

Accordingly, the Government did not have to consider all hours between 5:00 p.m. and 8:00 a.m., Monday through Friday and 24 hours for applicable Saturdays, Sundays and holidays during which the DUSM's were scheduled for the duty watch in calculating the number of hours worked in each bi-weekly pay period.

D. **The Treatment of Leave Time.**

In this portion of the claim the plaintiffs challenge what they believe to be the method by which the Department of Justice and the Marshal Service deduct leave time taken by a DUSM from hours worked in a FLSA pay period from the total hours worked in that pay period in calculating (a) the number of hours in a DUSM's tour of duty and (b) the number of hours any DUSM worked over the FLSA triggering point.

The statutory and case authorities clearly prevent an employer from considering vacation (leave) time when calculating the number of hours an employee works to determine whether the employee worked beyond the triggering point for FLSA overtime under Section 7 of the act (29 USC 207). That is to say: if an employee works for 10 hours in a pay period and, in that same period takes 30 hours of vacation or leave but thereafter works 20 hours in the same pay period, the employee cannot claim the last 20 hours as overtime work (for overtime pay). The reason is simple: the Act mandates the payment for overtime worked but overtime is not worked until the employee works beyond the triggering point. For purposes of the Act, vacation (leave) time is not work time. *Marchant v. Sands, Taylor & Wood Company, Keen v. Mid-Continent Petroleum Corp.*, both *supra*. This is distinguished from the situation where a DUSM works up to the triggering point, also works overtime, and in the same pay period, also takes some vacation (leave) time. In this latter instance, the defendant may not deduct from hours actually worked the number of hours taken as vacation (leave) time either from the overtime hours worked or

the hours of the regular schedule which were, in fact, worked. Section 207(a)(k) [29 USC 207 (a),(k)].

Moreover, a DUSM's vacation (accrued annual leave) is an inherent job benefit. To deduct leave time taken for hours worked as opposed to simply not counting leave time as hours worked would constitute a penalty.

Plaintiffs' contends that defendant improperly deducted leave time from the tour of duty worked by plaintiffs is not supported by the record in this case. Defendant's Exhibit 24, Federal Personnel Manual letter 550.1 sets forth the OPM required procedures for computing FLSA benefits to law enforcement officers paid under §7(k) of the Act. The regulations clearly provide that leave time shall not be included in the officer's tour of duty, but leave time is not deducted from those hours actually worked. What confuses plaintiffs' counsel is the manner in which the examples are presented in the regulation. In these examples, leave time is deducted from the employee's scheduled tour of duty, that is, the hours the employee is normally expected to be at work. Obviously, if the employee does not work the number of hours which the schedule anticipates, the hours of non-work, such as leave, must be deducted from the anticipated schedule. All of the examples in the exhibit initially credit the employee with the scheduled time between starting and quitting times but, subtract the periods of non-work and add additional work time, such as overtime to determine the actual tour of duty. (See p. 14 of attachment 4 to Defendant's Exhibit 24.)

The employee's leave is subtracted from his schedule, leaving his actual hours worked intact. The regulation clearly states that leave time is not deducted from hours of work actually performed by the plaintiffs. Finally, it is upon these regulations that Mary A. Nugent, Chief of the Department of Justice, Payroll Office, meticulously relied when the Justice Department calculated plaintiffs FLSA benefit. Deposition testimony of Mary Nugent read into the record by plaintiffs' counsel on January 4, 1980.

Plaintiffs were paid in April, 1978, for all FLSA benefits due them under the government's FLSA regulations. There is no dispute that the amount paid the plaintiffs in April, 1978, were accurate under the OPM regulations. Thus, an award of liquidated damages is the only issue, insofar as the plaintiffs' claim for a delay in FLSA payments is concerned.

THE PLAINTIFFS' ADMINISTRATIVELY UNCONTROLLABLE OVERTIME [AND] CLAIMS

In their Administratively Uncontrollable Overtime claims [hereinafter "AUO"] the plaintiffs advanced four complaints.

1. The regulations of the Civil Service Commission [hereinafter referred to as the "OBM", the shortened reference for its present name] and the orders and instructions/directives of the Department of Justice and United States Marshal's Service regarding premium pay for administratively uncontrollable overtime (AUO) contravened the enabling statute [5 USC 5545(c)(2)] and were and are ambiguous, vague, arbitrary and capricious.

2. The regulations, orders and instructions/ directives as aforesaid were and are illegal and unconstitutional based upon (1) above and the totality of the circumstances surrounding the DUSM usage and workload versus staffing levels in this district.

3. The DUSM job functions were admistratively controllable from an analysis of both the (a) totality of the circumstances existing in the district and (b) each particular job function when examined separately.

4. The weeklong watch duty which the DUSM's were scheduled to work constituted and constitutes stand-by duty compensable at time and one-half for all hours between 5:00 p.m., and 8:00 a.m., Monday through Friday and 16 hours per day for Saturdays, Sundays and legal holidays.

In order to more readily comprehend the conclusions more fully set forth below in this memorandum order and the judgment to be entered consistent with this order following the submission of the additional data as will be directed hereinafter, the following facts are determined from the evidence presented.

A. The Facts

1. Introduction

Each of the Federal districts throughout the United States is assigned a United States Marshal appointed by the President. Deputy United States Marshals are employed by the Service and work under the direction and supervision of the United States Marshal, the

Marshal Service Headquarters and the Department of Justice. The Deputy United States Marshals (DUSM's) carry out the duties imposed upon the Office of the United States Marshal. During all of the time period involved in this lawsuit, an overwhelming proportion of the DUSM's working in this district were assigned to the Miami office; for the latter portion of the pertinent time period, some DUSM's were assigned to the Fort Lauderdale and West Palm Beach Divisions of this district.

The regular workweek for a DUSM consists of five eight-hour workdays, Monday through Friday. A workday is scheduled to commence at 8:30 a.m. and terminates at 5:00 p.m., on a service-wide basis. This schedule includes the Southern District of Florida. The thirty minute excess is a lunch break, which is not compensable by the Government under the Federal Employee's Pay Act (FEPA) but is compensable under the FLSA.

Deputy Marshals are entitled to compensation pursuant to the provisions of the Federal Employee's Pay Act, Title 5, United States Code, Section 5541 et seq., and since its effective date of coverage, the plaintiffs are also covered by the Fair Labor Standards Act (FLSA), *supra*. When a DUSM works beyond his regularly scheduled workweek, the FEPA provides two distinct forms of compensation for the overtime. Title 5, USC §5542 authorizes time and one-half as the multiple for the DUSM's basic hourly compensation for all work in excess of forty hours when the excess work is administratively controllable and is "officially ordered and approved." A DUSM's basic hourly compensation

is determined by dividing his or her annual wages as set by statute by the divisor of 2080 hours. The 2080 hours are the maximum number of regularly scheduled work hours of a DUSM, and is also set by statute. Title 5, USC §5545(c)(2) governs the rate of pay for those hours worked by a DUSM in excess of the forty hour basic workweek which are not administratively controllable. Until its elimination with respect to Deputy Marshals in October 1978, this latter form of compensation was designated "administratively uncontrollable overtime pay." (AUO)

2. **The Southern District of Florida—In General**

Each DUSM completes a daily log which records his or her daily activities during the day and the number of hours worked by task. The daily log is submitted to the supervisor for approval. Based upon the information contained in the approved daily logs administrative support personnel complete time and attendance sheets (T & A's) which record the number of hours worked by each deputy during a two-week pay period. A form USM-6 reflects all work activity for the district on a monthly basis.

DUSM's in the Southern District of Florida undertake duties involving eight major categories or functions:

1. serving writs, summons and other papers,

2. serving and investigating warrants,

3. morning prisoner pick-up for court attendance,

4. prisoner returns either in the afternoon or at the end of the day,

5. courtroom duty,

6. prisoner coordination trips,

7. special assignments, and

8. other.

In the Southern District of Florida special assignments consist uniformly of (i) protecting witnesses, (ii) protecting judges and (iii) jury sequestration supervision.

For the six year period concerned in this proceeding the DUSMs have regularly worked substantial amounts of overtime generated by two undeniable facts. The first was an ever increasing workload and the second was an ongoing shortage of manpower with which to accomplish the responsibilities of the office. The combination of these factors resulted in an imposition of extra work on the part of the DUSM' working in the Southern District of Florida during this time period. From 1971 to and through 1976, the operational level of Deputy Marshals in the district rose from fifteen to twenty-nine, the workload for the district as a whole and thus each DUSM within the district increased at a much greater rate, leaving too few DUSMs to accomplish the work within the regularly scheduled forty hour workweek. The Marshal for this District repeatedly requested additional manpower with which to meet the responsibilities of his office. For fiscal year 1976 alone

the Marshal for this district requested eight more deputies than the Service allocated to him.

3. **Service of Process; Prisoner Coordination Trips; Service and Investigating Warrants; Prisoner Pick-ups; Wednesday Staff Meetings.**

The manpower level vis-a-vis the daily requirements from Monday through Friday necessitated the district reserving almost exclusively for the weekends the prisoner coordination trips. These coordination trips constituted almost fifty percent of the total AUO dispute between the parties.

The constant shortage of sufficient DUSMs personnel also required the district to assign the service of process to every deputy. Serving process constituted almost five percent of the total AUO dispute between the parties, except during the time period 1974 through 1977 when AUO usage based upon serving process rose from six percent to twenty-six percent. This remarkable increase in AUO hours required for and consumed by serving process was related to the giant land condemnation proceedings concerning and affecting vast portions of the Florida Everglades.

Indeed, the chronic shortage of sufficient DUSMs in the district is confirmed by a comparison of the increase in AUO hours for service of process in the 1974-1976 time frame and the AUO hours generated by the function of investigating and serving warrants. The investigating of warrants occupied seven to ten percent of all the AUO hours generated in 1974 to 1976, but dropped to only one percent in 1977, the year in which

the service of process peaked to 25.9%, more than doubling the preceding years percentage of total AUO hours worked in the district. Obviously, were there a sufficient number of DUSMs assigned to the district, the AUO hours generated by these two job functions would not contrast so sharply. Nor would the drop in one function be simultaneously replaced with an increase in another function unless the cause was an overall, district-wide manpower shortage. Finally, the manpower shortage is again confirmed by a careful review of the computer data for 1977-78. In those years, there was a drastic reduction of AUO hours (AUO was formally abolished in October, 1978) but at the same time regular overtime hours increased considerably.

The court further finds that additional manpower within the district, if provided by the Service, would have permitted rescheduling, principally through the initiation of a two-shift day with the early shift commencing at 7:30 a.m., Monday through Friday, and that this would have eliminated virtually all of the overtime generated through early morning prisoner pick-ups.

Supervisory Marshal Cecil Miller credibly testified that he could have scheduled early morning pick-ups if allowed to do so, but such functions were not scheduled because he was not allowed to do so. The same positive effect on the reduction of AUO hours worked in the service of process would have resulted from the service allowing the additional manpower reportedly requested by the Marshal.

Generally these four functions, prisoner coordination trips, prisoner pick-up, service of process and service and investigating warrants, when combined, approximated 60% of the AUO dispute between the parties.[19]

Tabulating the AUO hours by day of the week discloses consistent patterns. During the regular Monday through Friday workweek, the percentage of AUO assigned to each duty remained stable. There is a percentage decrease of AUO for each duty on Wednesdays, the constant decrease of which is explained by the staff meetings conducted regularly that day throughout the six year period. These staff meetings recurring every Wednesday at the same time of day, constituted 18% of the total Wednesday AUO hours throughout the six-year period. The prisoner coordination trips during the Monday through Friday regular workweek constituted approximately 15% to 20% of the regular week workday AUO hours but constituted approximately 65% of the AUO hours on Saturday of every week and 77% of the Sundays of every week throughout the six year period. The only other duties which constituted more than 5% of the AUO hours on weekends were serving process (10% on Saturdays) and special assignments (12% on Saturdays and 13% on Sundays).

The consistency of duties constituting the AUO hours would be a principal factor in determining whether those duties could be scheduled. Among the important factors in determining consistency are; (a) the probability that AUO will be assigned for a given duty on any specific day and, if assigned, (b) the probability that it will be assigned the next day. Additionally,

consistency is demonstrated where average AUO usage on an annual, monthly and daily basis documents a pattern which could and should be subject to scheduling. Keeping this in mind when we examine the plaintiff's summary of the percentage of days on which AUO was assigned for the eight major duties comprising AUO hours worked during the six year period, this Court finds the extremely high percentages of AUO hours comprised of prisoner coordination trips, prisoner pick-ups and Wednesday staff meetings occurred on at least 75% of the relevent workdays. In some of the pertinent years, serving process and investigating warrants comprised AUO hours about 50% of the relevant work days.

Repetitiveness, the next major element of schedulability also seems apparent from the plaintiffs' summaries. Repetitiveness gives rise to the probability that if AUO hours are being worked for a duty on one day, it will be used for the same duty on the next day or after a specified interval. The percentages of consecutive day AUO usages credibly established by the plaintiffs exceed 80%, creating odds of at least 4 to 1 that the duty allocated AUO hours on one day will be allocated AUO hours on the following day. The percentages consistently exceed 50% throughout the eight major functions and approximately 90% for prisoner coordination trips and staff meetings. The Wednesday morning staff meeting from 8:00-8:30 a.m., occurred almost every Wednesday throughout the six year period.

B. **The Law.**

The AUO controversy centers, primarily, on the plaintiffs' contention that they received AUO pay for overtime that should have been compensated at the rate of time and one-half. The FEPA (5 USC 5541 *et seq.*) and the regulations promulgated thereunder establish two separate and mutually exclusive forms of overtime compensation. Hours of work in excess of the forty hour regular workweek must be compensated at an hourly rate equal to one and one-half times the employee's basic hourly compensation if the work done has been "officially ordered or approved." 5 USC 5542(a). Hours of duty that exceed the basic workweek but which cannot be controlled administratively are compensated by a designated percentage of the employee's basic annual pay. 5 USC §5545(c)(2). This latter form of compensation is AUO.

Overtime worked by a DUSM with the knowledge and inducement of supervisory personnel is normally considered to be officially sanctioned. *Bynes v. United States*, 330 F.2d 986 (Ct. Cl. 1964); *Fox v. United States*, 416 F.Supp. 593 (E.D. Va. 1976). The overtime at issue in this proceeding, therefore, must be considered as having been "officially ordered or approved." *Fox v. United States, supra* at 597. Whether the overtime must be compensated under the time and one-half provisions of Section 5542(a), *Code, supra*, or the AUO provisions of Section 5545(c) *Code, supra*, depends upon whether the overtime is administratively controllable.

The Court is satisfied from the facts presented and determined above that based upon the defendant's own

standards, which for purposes of this portion of the order, are assumed to be legal and valid, the overtime work by the plaintiffs when serving process and warrants, performing prisoner pick-ups and in performing prisoner coordination trips must be regarded as having been administratively controllable.* 5 USC 5545(c)(2) was intended to provide compensation to certain government employees whose hours of duty could not be controlled administratively and who were required to perform substantial amounts of irregular overtime with the employee, without supervision, solely determining the time and hours of overtime. 1954 *U.S. Code Cong. & Admin. News* 3816, 3824 (1954). Specifically, the statute provided:

> *(c) The head of an agency, with the approval of the Civil Service Commission, may provide that —
>
> * * *
>
> (2) A employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty and duty at night, on Sundays, and on holidays *with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty*, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime duty.***" (emphasis added)

The Department of Justice established certain criteria by which administrative controllability was to be determined, based upon the authority given it by the Civil Service Commission. 5 CFR 550.151 and 550.153. Department of Justice Order No. 1551.4 dated April 14, 1975 and 1551.4A dated August 1, 1975 (PX 84) in pertinent part provides:

> "The position (for which AUO pay is authorized) must be one in which the hours of duty cannot be controlled administratively, e.g., by hiring additional personnel, rescheduling the hours of duty, or granting compensatory time to offset overtime hours required.

The overtime required to be worked by the plaintiffs in the four duties or functions previously noted was routinely required to be worked and was demanded of the plaintiffs on a constant and on-going basis. Such was therefore "recurrent." Almost continuously, the overtime in these four duties or functions was generated at the beginning or end of the regularly scheduled hours for the Monday through Friday administrative workweek. The record well demonstrates that a shortage of manpower, was the principal factor which accounted for the overwhelming portion of the overtime work. That so vast an amount of recurring overtime was worked in these four duties or functions alone supports this conclusion.

The Court thus finds that based upon the very terms of the applicable Department of Justice order the overtime work by the plaintiffs when serving process,

investigating or executing warrants, performing prisoner pick-ups and performing prisoner coordination trips could have been administratively controlled by the hiring of additional personnel or the rescheduling of relevant duty hours. Accordingly, the Court finds that the utilization of AUO compensation pursuant to Section 5545(c), *Code, supra*, was erroneous and that the overtime so worked in these duties/functions must be compensated at time and one-half the basic hourly rate of pay of the employees.

C. The Facts and Analysis Concerning Courtroom Security and Prisoner Returns.

The overtime generated by the Deputy Marshals performing courtroom security and end of day prisoner returns must be analyzed differently than the first five duties or functions previously discussed.

The DUSMs courtroom duties or functions include providing courtroom security to the judges and juries in this district. End of day prisoner returns usually followed the completion of the court's collective calendars. The overtime worked in these functions was administratively uncontrollable and therefore, not subject to the time and one-half pay provisions due to the facts which the Court now finds and the conclusions of law which hereinafter follow. The courtroom duty principally consists of DUSMs attending criminal cases pending in the district. Deputy Marshals were limited to criminal cases throughout the period of time covered by these proceedings due to the personnel shortage. While in attendance during trials and other proceedings on the Court's criminal docket DUSMs would escort

prisoners or in-custody defendants to and from the cellblock for their court appearances. The deputies thereafter remained throughout the proceedings to accomplish the dual purpose of escorting the incarcerated persons and to respond to circumstances which might require lawful force and other security measures to insure the integrity of the judicial process. A third aspect of court duty included providing security for juries while they were deliberating and sequestered. Returning prisoners to institutions for incarceration at the end of the court's day is self-defined.

The marshal for the district and his supervisory DUSM in charge of court security testified that had the office been authorized to schedule a two shift day, they would have done so, starting the first or early shift at 7:00 a.m., and the late or second shift at 10:30 a.m. The late shift would have concluded its scheduled shift at 7:00 p.m. This late shift, plaintiffs urge, would have eliminated substantial amounts of overtime generated by court duty where the court remained in session after 5:00 p.m., whether or not the presiding judge gave advance notice to the Marshal; and likewise, this would have eliminated overtime incurred in returning prisoners. The plaintiffs also urge that DUSMs working the late shift could be substituted for the deputies previously providing the court security during their regular shift since each of the DUSMs are equally qualified to perform all the duties required of the Service that have generated the overtime hours that are the subject of this litigation.

The Court is cognizant of some of the plaintiffs' contentions with respect to the functions of courtroom

security and end of day prisoner returns, but does not accept them. A two-shift day may have eliminated some of the overtime generated by these two duties/functions, but it would not have eliminated all of it. Additionally, how much of the overtime might have been eliminated was not demonstrated by the plaintiffs and is too speculative for the court to determine. There was overtime involved in both court security and prisoner returns which, of necessity, could not be scheduled in advance because the hour of day when it would have been called for was unpredictable, and the work not repetitive, consistent or stable as to the mean number of hours per deputy over various time periods, and the mean of occurrences and the mean of the duration of each occurrence not sufficiently ascertainable so as to be schedulable. The Court concludes, therefore, that to the extent that overtime was generated by courtroom security, it was not regularly schedulable and was not otherwise administratively controllable within the defendant's regulations. 5 CFR 550.153(a); DOJ Order 1551.4 and 1551.4A (PX 84).

The plaintiffs also asserted that the remainder of the overtime generated by courtroom security and prisoner returns was administratively controllable through the rescheduling of hours. The marshal later avoided overtime hours generated by the DUSMs making morning prisoner pick-ups sufficiently early to have incarcerated persons in court for a 9:00 a.m., starting time when the AUO rate of compensation was eliminated for DUSMs on a service-wide basis in October, 1978. In that instance the Service, facing time and one-half compensation for all overtime incurred, requested the judges of this district to not commence

court proceedings requiring the attendance of prisoners or in-custody defendants until 9:30 a.m., thus permitting the DUSMs assigned the duty of bringing in-custody persons to court to do so within the regularly scheduled workday. But a similar request of the judges in the district could not have eliminated court security duties overtime, other than sequestered juries, after normal working hours. In other words, the Courts could not have notified the Marshal of the need for those few occasions when the court day would extend beyond 5, 6, or 7:00 p.m., even if it had been asked to do so. See *Bilotti, et al., v. United States*, Nos. 452-72, 25-74, 350-74 (Ct. Cl. 1980) (unpublished) p. 13.

D. **Omnibus Considerations: The Predictability of the Work's Duration and Who Determines "To Work."**

The Court further concludes, as have two other courts addressing similar issues, *Aviles v. United States*, 151 Ct.Cl. 1, 7-8 (1960) and *Bilotti, et al., v. United States, supra*, at page 13, that unpredictability of the duration or length of a duty assignment does not effect the schedulability of the work or that the work should have been regularly scheduled. Furthermore, administrative controllability for the purposes of these proceedings has nothing to do with the controllability of the conditions which create the need for overtime. *Fox v. United States*, 416 F.Supp. 593 (E.D. Va. 1976), *Aviles* and *Bilotti*, both *supra, (Bilotti* at page 8). For the purposes of the overtime pay of DUSMs, controllability must address only the questions of (a) whether the hours of overtime work required by the demands of the Marshal Service, within or beyond control by the Service itself, are in fact

"regularly scheduled overtime" duty within the meaning of Section 5545(c)(2), *Code, supra*, or (b) may be controlled by "hiring additional personnel, rescheduling the hours of duty . . . ." as provided in 5 CFR 550.153(a); DOJ Order 1551.4 and 1551.4A. The defendants' main defenses and arguments on the AUO claims, namely, that the overtime generated throughout the pertinent years was caused by conditions outside the control of the Marshal Service and that the duties herein concerned could not be scheduled because, among other things, the exact duration of the assignments was not known prior to the commencement of the assignment, are thus rejected. To conclude otherwise would violate the rule of reason for one cannot normally determine the duration of an assigned task before that task is begun, regardless of the profession, trade or calling in which the task falls. The regulations (550.151 and 550.153[a]) do not define "regularly scheduled" or "schedulability" so as to include the known duration of any assigned duty.

There is, moreover, a more fundamental reason for this Court's conclusion that the overtime generated in this district during the pertinent period, for service of process and other court writs and warrants, early morning prisoner pick-ups, prisoner coordination trips, special assignments and "other" work consisting of the weekly Wednesday staff conference was susceptible of scheduling; that is the nature and circumstances of these pertinent DUSM duties or functions do not entail work where ". . . the employee (is) generally responsible for recognizing, without supervision, circumstances which require him to remain on duty . . . ." 5 CFR 550.151 (35 FR 6311, Apr. 18, 1970).

The Court further finds that with respect to all the duties/functions of the DUSM's the difference in compensation between the AUO which was in fact paid and the rate of pay of time and one-half the hourly rate which should have been paid is,

ANNUAL DIFFERENCE IN DOLLARS BETWEEN AUO PAID AND TIME AND ONE-HALF THAT SHOULD HAVE BEEN PAID (YEAR BY YEAR)

1971	$20,144.00
1972	$30,216.00
1973	$36,734.00
1974	$43,677.00
1975	$57,659.00
1976	$46,395.00
1-4/1977	$ 9,165.00
	$243,990.00

and that difference throughout the 6 years covered in this case on a function by function breakdown is:

DIFFERENCE IN DOLLARS BY DUTY/ FUNCTION BETWEEN AUO PAY RECEIVED AND OVERTIME PAY THAT SHOULD HAVE BEEN PAID OVER THE PERIOD (4/71-4/77)

PC Trips	$104,916.00
Sp. Assignments	34,159.00
Prison Returns	24,399.00
Prisoner Pick-Up	19,519.00
Service of Process	17,079.00
Investigating Warrants	14,639.00
In Court Duty	7,320.00
Other	21,959.00
	$243,990.00

From these findings the final judgment to be entered by the Court shall reflect a reduction of $24,399.00 for prisoner return overtime, $7,320.00 for Court security duty overtime, and $7,026.88 for 32% of the overtime in the "other" category which was not worked in the weekly Wednesday 8:00 a.m., staff meetings.

Judgment will be entered consistent with the foregoing after the Court has considered the additional FLSA data and summaries heretofore identified and plaintiffs' motion for attorneys' fees on the FLSA portion of the complaint. Section 16(b), *Act, supra*; (29 USC 216[b]). If a bi-lateral stipulation cannot be reached between the parties and filed within thirty (30) days of this order on the requested FLSA data and summaries, each side shall file affidavits covering the requested information no later than thirty (30) days from this date.

DONE AND ORDERED in Chambers at Miami, Florida, this 2nd day of April, 1984.

/s/ Wm. M. Hoeveler
UNITED STATES DISTRICT JUDGE

Copy furnished to:
Arthur Tifford, Esq.
Lucille K. Cirino, Esq.
Kenneth C. Holecko, Esq.
Ana Barnett, Esq.

FOOTNOTES

1. Full citations *infra*

2. Fair Labor Standards Act (1938), as amended, Public Law, Chapter 676 dated June 25, 1938, 52 Stat. 1060, 29 United States Code, Section 201 *et seq.*

3. That body of government is now referred to as "the Office of Budget and Management ("OBM")

4. Firefighters were also included within the expanded coverage of the Act but were not the subject of these proceedings.

5. The defendant urged the Act applied to DUSM's effective January 1, 1975, when all "law enforcement" personnel became covered. The plaintiff's challenged this contending the Act covered them since May 1, 1974. The Court finds for the defendant on this point and will develope its findings of fact and conclusions of law *infra.*

6. The plaintiff's claim for the willful tardy FLSA overtime payments does not stand or fall on the Court's determination of this first point. The defendant's delay from a January 1, 1975 effective date is as tardy as if the delay began to run on May 1, 1974.

7. Between the spring of 1975 when she started her supervisory position in the Department's payroll

and support center and her departure from the job in April, 1978, Ms. Nugent had more than one dozen conversations with Mr. Neaton in which the latter advised her that staff shortages prevented implementing FLSA overtime requirements. (PX 19, pp. 27-28; 31). This information was conveyed by Ms. Nugent to her supervisors when she urged as late as September 28, 1977, that the work on paying retroactive FLSA overtime was moving at an ". . . agonizingly slow rate . . . ." (PX 12)

8. The Department's staffing of the payroll section, especially in the face of the Act's requirement for prompt overtime payment, should be described as indifferent. In the face of actual or threatened lawsuits (PX 6; 12, 13) repeated and ever increasing inquiries (PX 9) and an "agonizingly slow rate . . ." of progress (PX 12), echelon's of management as high as the Assistant Attorney General for Administration (PX 9; 16) refused to allow more than two summer employees to work on extracting information needed to make retroactive FLSA payments, and then replaced those two seasonal employees with one payroll clerk, limiting all work on the retroactive payment project to a "time available basis." (PX 12) Until as late as November 30, 1977, only six part-time, student aides and one management analyst comprised all the devotable manpower for ". . . this most pressing requirement." (PX 13).

9. For example, the first work sheet for FLSA overtime computations was finalized on October 22,, 1976 (PX 18, p. 54-56), yet retroactive FLSA

overtime payments were not accomplished until April 7, 1978.

10. So overworked was the payroll center that it was not until the spring of 1977 that data from the Southern District of Florida for retroactive FLSA overtime was even requested. (PX 19, p. 49).

11. See also, Sen.Rep. No. 640, 81st Cong., 1st Sess., 1949 U.S. Code Cong. Serv. 2241, 2247-49.

12. Compare *Walling, Keen* and *Reid*, all *supra*, with Title 29, Code of Federal Regulations, Section 778.106.

13. The Department's letter and the Commission's pertinent response were admitted as exhibits to Mr. Bernard Neaton's deposition (PX 18).

14. The language ". . . at a rate not less than one and one-half times the regular rate at which he is employed" was placed and maintained in Section 7 of the Act (29 USC 207) from its inception. See Public Laws–Ch. 736–October 26, 1949, 63 Stat. 910; Public Law 87-30–May 5, 1971, 75 Stat. 65, Public Law 93-259–April 8, 1974, 88 Stat.60.

15. Senate Report No. 402, May 18, 1949 and House Report NO. 121, February 15, 1949. This Senate Report repeats in substance the House Report.

16. At one and one-half times the regular rate as previously defined herein.

17. The attorney's fees will be determined subsequently, following the filing of an appropriate motion and supporting affidavits.

18. The statutory scheme upon which the Plaintiffs advance their AUO claims is the Federal Employees Compensation Act, as amended Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 487, Pub. L. 90-83, §1(27), Sept. 11, 1967, 81 Stat. 200, Title 5, *United States Code*, Section 5545, and particularly 5 USC 5545(c)(2).

19. Based upon an analysis of the percentage of AUO hours assigned to each of the duties, Professor McClave calculated that for all of the years 1971 through 1977, the four functions (prisoner pick-up, serving and investigating warrants, prisoner coordination trips, service of process) are totalled as follows:
1971—49.6% of all AUO hours worked
1972—62.1% of all AUO hours worked
1973—64.7% of all AUO hours worked
1974—67.3% of all AUO hours worked
1975—66.6% of all AUO hours worked
1976—62.5% of all AUO hours worked
1977—42.6% of all AUO hours worked

20. The Court will address the Plaintiffs' contention that they were working stand-by duty during the seven consecutive day duty watch assignment *infra*.

21. For purposes of this discussion, the Court is going to assume that the regulations established by the Civil Service Commission (now OBM) and the order, instructions and directives issued by the Justice Department and Marshal Service are legally sufficient in all respects.

22. The mutual exclusivity of *Fix v. United States*, 368 F.2d 609 (Ct.Cl. 1966); *Burich v. United States*, 366 F.2d 984 (Ct. Cl.1966) also need not be addressed by the Court.

23. Earlier Department of Justice orders to the extent that they relate to AUO and the question of administrative controllability are consistent with Order No. 1551.4 and .4A.

24. The Court notes that to the extent that sufficient facts were before it, the United States District Court for the Northern District of Illinois, the Honorable Nicholos J. Bua, presiding, ruled similarly as to the functions which this Court addressed (service of process, investigating or executing warrants, and prisoner pick-ups) in another Deputy Marshal overtime case entitled *Bolden v. United States*, Case No. 77-C-3077 in the Marshal's Cross-Motion for Summary Judgment dated April 21, 1980. See Exhibit "5" attached to the Plaintiff's Final Argument and Proposed Findings of Fact and Conclusions of Law.

25. Mr. Shoemaker, the Chief Supervisory DUSM under the Marshal testified that the district could not go to a two shift day, in his opinion, but that

was due to the shortage of DUSMs assigned to the district. If there is a dispute between what Marshal Forsht and Supervisory DUSM Miller testified to concerning a two-shift day and what Mr. Shoemaker said, the cause was an administratively controllable one: by hiring additional personnel.

26. Based on the record before it, the trial judge in *Bilotti* concluded that courtroom duty in the nature of courtroom security was unpredictable as to the time of commencement. This Court although not bound by that conclusion, has applied its rationale vis-a-vis the duty/functions of court security to this case. Herein the Marshal rescheduling to eliminate earlier than 8:00 a.m., prisoner pick-up through the managerial tool of conferring and reconciling with the Judges of the court to start up time for proceedings requiring such persons presence simply cannot be projected to the end of day court security or prisoner return situations.

27. The findings and conclusions rendered herein obviate the Court's ruling upon the plaintiffs' constitutional attack on the OPM regulations and the DOJ Orders issued based upon 5 USC 5545(c).

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No.: 77-1242-Civ-WMH

ALBERT SLUGOCKI, etc., et a.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION AND ORDER APPROVING LIQUIDATED DAMAGES AND PREJUDGMENT INTEREST AGAINST THE DEFENDANT, AND APPROVING PAYMENT OF ATTORNEY'S FEES AND COSTS FOR CLASS COUNSEL

On April 2, 1984 this Court rendered findings of fact and conclusions of law in the memorandum opinion addressed to the two causes of action brought by the class of Plaintiffs herein. In doing so the Court reserved final decision on the "good faith" issue raised by the defendant in opposition to the Plaintiff class request for

liquidated damages based upon the violations of the Fair Labor Standard Act of 1938, as amended.[1]

A. Liquidated Damages and Prejudgment Interest.

For the reasons set forth in the Court's previous memorandum opinion, pp. 2–11, and the findings rendered therein, the Court now concludes that the class of Plaintiffs are entitled to liquidated damages on their FLSA claim. The Court further concludes that prejudgment interest on the claim is justified and will be included in the final judgment.

The Court's memorandum opinion entered April 2, 1984 directed the parties to file bi-lateral stipulations concerning the FLSA data and summaries in order to determine the additional FLSA premium due the class of Plaintiff for the years 1975 through 1978, failing which each side could file its own affidavits covering the requested information. The defendant elected not to file or otherwise present this Court with the additional calculations requested, unlike the Plaintiffs. Through one of their expert witnesses, Professor James T. McClave, the Plaintiff class submitted unchallenged an affidavit satisfying this Court as to the precise additional FLSA premium due the Plaintiff class for the pertinent period of time. This Court finds that the additional FLSA premium due each year is as follows:

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[1]Fair Labor Standards Act (1938), as amended, Public Law, chapter 676 dated June 25, 1938, 52 Stat. 1060, Title 29, *United Staters Code,* §201 *et seq.*

1975	$1,855.53
1976	$1,493.04
1977	$ 903.15
1978	$ 693.80

This additional FLSA premium, totalling $4,945.52 is subject to the equal amount in addition as liquidated damages authorized by the Act, §16 [Title 29, *United States Code*, §216]. In addition, the underpayments as determined herein and in this Court's memorandum opinion rendered April 4, 1984 are subject to pre-judgment interest from the respective dates the wages became due. *Usery v. Godwin Hardware, Inc., op. cit Memorandum Order: Brennan v. Maxey's Yamaha, Inc.* 513 F.2d 179 (8th Cir. 1975).[2] The plaintiff class is entitled to pre-judgment interest irrespective of this Court's determination as to the defendant's lack of "good faith" regarding the liquidated damage issue. *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241–242 (5th Cir. 1973); *Hodgson v. Day Manufacturing Co.*, 445 F.2d 823 (8th Cir. 1971); *Brennan v. Maxey's Yamaha, Inc., supra.* In order to avoid the complexity of computing the interest on the additional FLSA premium wrongfully not paid to the plaintiff class, this Court will adopt as the starting point for the period during which interest is to be calculated as the first day of each calendar year following the year in which FLSA overtime accrued. Accordingly, the FLSA premium overtime earned but not paid in 1975 will accrue interest from January 1, 1976, the same for the FLSA premium earned but not paid in 1976 which will accrue interest as of January 1, 1977, and so on. Based on the legal rate of interest during the pertinent periods of time the FLSA premium

[2]See also: Fair Labor Standards Act of 1938, §7(a)(2), 15(a)(2) as amended, Title 29, *United States Code*, §207(a)(2), 215(a)(2).

which should have been paid to the Plaintiff class earned interest through February 25, 1985 amounting to Three Thousand Seven Hundred Eighty-one and 16/100 Dollars ($3,781.16).[3]

B. **Costs and Expenses.**

Of the costs and expenses requested by the Plaintiffs only the following are granted: court reporters' charges in the amount of One Thousand Two hundred seventy-six and 99/100 ($1,276.99); only so much of the travel expenses for the taking of depositions of Mary Nugent and Bernard Neaton in April, 1979 [Five Hundred Sixty-seven and 86/100 ($567.86)] and May, 1979 [One Hundred Nineteen and 99/100 ($119.99)], respectively. Travel, per diem and subsistence for Professor James T. McClave and Howard Sheppard, C.P.A., shall be granted as follows: For Professor McClave, Six Hundred Twenty-eight and 90/100 ($628.90) for travel and Six Hundred Dollars ($600.00) per diem/subsistence ($50.00 × 12 days). For Mr. Sheppard, One Thousand Thirty-five and 16/100 Dollars ($1,035.16) travel and Six Hundred Dollars ($600.00) per diem/subsistence ($50.00 × 12 days). The travel and court reporters' costs were reasonably incurred as necessary to effectively prosecute this case. The costs and expenses for Professor McClave

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[3]The Court takes judicial notice of *Florida Statutes* §55.03, Laws 1977, c. 77–354, §7; Laws 1980, C. 80–110 §1; Laws 1981, c. 81–113, §1 which, respectively, increased the rate of interest on judgments of Florida Courts from 6% to 8%, 10% and 12% as of October 1, 1977, October 1, 1980, and October 1, 1981. See Title 28, *United States Code,* §1961. A detailed chart of the FLSA premium amount, rate of interest, effective dates, per diem rate, number of days and resulting interest is appended hereto as Exhibit 1.

and Mr. Sheppard are the same as allowed "fact" witnesses pursuant to Title 28, *United States Code*, §1821. *Jones v. Diamond*, 594 F.2d 997, 1029 (5th Cir. 1979).

C. **Attorney's Fees.**

The Plaintiffs, a class certified by order of the Court dated December 23, 1977, as amended, have moved this Court for its order taxing attorney's fees reasonably incurred in the prosecution of this case. The Plaintiffs have argued in their moving papers and at a hearing on the motion that their requests are authorized by the Fair Labor Standards Act, Title 29, *United States Code*, Section 201, *et seq.* and the *Equal Access to Justice Act*, Title 28 *United States Code*, Section 2412 *et seq.* The motions were supported by the affidavits of Arthur W. Tifford, Esq., lead counsel of record for the Plaintiff class, Lawrence R. Metsch, Esq., of the firm of Hauser and Metsch, P.A., Miami, Florida, and George A. Kokus, Esq., also of Miami, Florida, both of whom reviewed the files, legal research, exhibits and related material before rendering their opinions as to the value of services rendered based on an hourly computation and estimate of the accomplishment for all persons affected by the Court's order and judgment. Based upon the reasons and findings set forth below the Court grants in part and denies in part the Plaintiff class motion for attorney's fees. In doing so the Court relied on the twelve-factor test set forth in *Johnson v. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)[4] and the recent ruling by the

[4]Fifth Circuit law is binding on the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

United States Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The Court concludes that class counsel fee award of Thirty-nine Thousand Eight Hundred Fifty Dollars ($39,850.00) is justified and reasonable.

I.

PROCEEDINGS TO DATE

This lawsuit began in April, 1977 with the filing of the original complaint that was amended in January, 1979 to include causes of action for violations of the Fair Labor Standards Act (hereinafter "FLSA" or "the Act"). The Court presided over this case during the more than seven years in which these proceedings were litigated. Literally tens of thousands of documents, perhaps as many as 60,000 required analyzation, extraction of pertinent data, compilation with the assistance of major computer programming, and hundreds of administrative orders, directives, memoranda, correspondence, had to be read, analyzed, digested and marshalled for their applicability to the issues in this case. In addition, hundreds of pages of regulations promulgated by the Secretary of Labor and published in Title 29, *Code of Federal Regulations* had to be studied and compared with additional hundreds of pages of the Act's legislative history, including the legislative history to which five major amendments have been added since 1939. In preparing to present and thereafter presenting the Plaintiff's contentions, counsel was required to laboriously study and analyze, and thereafter compare complicated statutory provisions codified in Title 29, *United States Code,* Section 201 *et seq.* with administrative regulations in Title 29, *Code of Federal*

Regulations, with regulations, directives or guidelines, as appropriate, first published by the Civil Service Commission in 1974 and 1975, with departmental regulations, instructions or guidelines issued by the United States Department of Justice and its United States Marshal Service. Thereafter, memoranda, instructions, bulletins, TWX's, orders and correspondence, each and all addressing the statutes, regulations or directives previously referenced had to be analyzed, digested and comprehendingly presented and argued to the Court based upon the compilation of the pertinent facts extracted from the many documents, all by the Plaintiffs' counsel.

Bench trial proceedings consumed twelve days spaced over two (2) years due to the Court's overburdened trial (principally criminal) docket and the parties' original inability to accurately predict the duration of trial. The twelve days of trial covered January 3 and 4, 1980, January 28, 1980, May 5, 6, 7, 8, 9, 13, 1980 and December 4 and 15, 1980. The concluding day or days of the trial occurred in December, 1981.

To call this case complex would be an understatement. During the course of the trial I commented on more than one occasion about the nature of the evidence presented. The complexity prompted the Court to direct the filing of post-trial written arguments on each of the many issues to be resolved. The written arguments by the Plaintiff class and the Defendant—both lengthy—lengthy—were under consideration by the Court for approximately a year before three final argument proceedings were ordered, each being limited to a narrow issue or series of issues. These arguments

were held on February 18, March 4, and April 29, 1983. Thereafter, the Court considered the issues and studied exhibits, off and on, for almost six months before announcing its ruling. On September 30, 1983 the Court announced its ruling, directing the submission of proposed findings of fact and conclusions of law. Those were submitted in November, 1983 and kept under consideration and re-worked approximately five months before the memorandum order with findings of fact and conclusions law was entered on April 2, 1984.

The benefits to the class will be discussed in Section III *infra*. Those benefits, directly or indirectly, may have some effect as to federal employees throughout the nation, a group consisting of somewhere between 250,000 and 300,000.

II

FEES REQUESTED

The Plaintiffs requested an award of attorneys' fees for class counsel for a total of 912.149 hours pursuant to both the FLSA and the EAJA. The Court concludes, however, that a fee award is justified only pursuant to the FLSA on those claims. A separate fee for that phase of the proceedings referred to as the "AUO" phase was the subject of a separate agreement between class counsel and the class. The Court also concludes that counsel has incurred a loss as a result of the length of these proceedings, precipitated by the effect of the Consumer Price Index/inflation rate on the amount of money which should have been received much earlier had the litigation concluded sometime in 1980.

III

GENERAL STANDARDS GOVERNING DETERMINATION OF FEE AWARDS

In determining the award of attorneys' fees, the Court relied on *Johnson v. Georgia Highway Express, Inc., supra,* and its progeny. See *Marion v. Barrier,* 694 F.2d 229 (11th Cir. 1982); *Fitzpatrick v. Internal Revenue Services,* 665 F.2d 327, 332–33 (11th Cir. 1982). Also pertinent are later Fifth Circuit decisions specifying certain procedures to be followed by the trial court applying the twelve *Johnson* factors. *Fitzpatrick,* 665 F.2d at 332, citing, *Copper Liquor, Inc., v. Adolph Coors Co.,* 624 F.2d 575 (5th Cir. 1980); *Matter of First Colonial Corp. of America,* 554 F.2d 1291 (5th Cir.), *cert. den.,* 431 U.S. 904 (1977). Finally, the recent standards announced in *Hensley v. Eckerhart, supra,* are also pertinent.

To insure a proper basis for and an adequate explanation of the fee award, three basic steps are required of the trial court. First, the Court must evaluate and determine the nature and extent of the services provided. If the facts are disputed, an evidentiary hearing must be held. Second, the court must decide the value of those services, given customary charges in the area, any special expertise, and the quality of work performed. These first two steps result in the determination of a nominal fee, which the court then can adjust after considering the relevancy of the remaining *Johnson* factors and articulating how each

of those factors affects the final award. *Fitzpatrick*, 665 F.2d at 332.[5]

The factors to be considered in making the fee award are as follows:

1. **Time and Labor Required**

As evidenced by the attached affidavits, the petitioners since April, 1977, have expended 912.149 hours in the prosecution of this case, in settlement negotiations, and in preparing this application.

A great majority of counsel's hours were supported by time records. In those instances where such records were unavailable, conservative methods of reconstruction were employed. It appears that unnecessary duplication of services were scrupulously avoided. For example, Plaintiff's counsel stated that hours spent in travel to Washington, D.C. preparatory to the depositions of Ms. Mary Nugent and Mr. Bernard Neaton in April and May, 1979, were, as customary, used for dictation and other preparation. That time not so employed was excluded from the tabulation. The Government did not challenge Plaintiff counsel's affidavits, the time tabulations or the affidavits of the reviewing attorneys, Messrs Metsch and Kokus. The Court finds that Plaintiff class counsel's representations as to time spent on this case to be careful and reasonable, without unnecessary duplication of effort. The Court further finds that the investment of time by

[5]This interpretation of *Johnson* adopts a standard similar to the "lode star" method utilized by the Second, Third, and District of Columbia. *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1093 (5th Cir. 1982).

Plaintiff counsel was substantial, necessary and is satisfactorily documented for this fee award.

2. **Novelty and Difficulty of Questions**

The issues involved in this litigation have been factually and legally complex from inception. The introductory language to this order is incorporated herein by reference. According to counsel, the volume of exhibits introduced at trial represent no more than the tip of the iceberg of the stacks of documents that had to be read, analyzed, used to extract data for computer assisted compilations and projections. Those source materials, consisting of daily logs, covering a six year period, bi-weekly earning statements, monthly USM–6 Reports covering the same six year time period, generated almost 700 pages of computer runs. (See Plaintiffs' Exhibits 50, 51, 52, and 53) Many of those, although facially applicable to the AUO portion of the proceedings, also applied to the FLSA portion, the latter being the subject of this order.

This case, as the Court determined in its memorandum order dated April 2, 1984, was one of the early one's filed making challenge to the overtime pay disputes in the United States Marshal's Service. This Court's ruling striking down as illegal the continued use of the original Civil Service Commission definition of the words "regular rate of pay" for purposes of computing time and one-half overtime pay under the Act is not only a case of first impression, but may have nationwide application to many federal employees subject to and qualifying for overtime under the Act. There is no question but that *Slugocki v. United States,*

raised numerous novel, complex and difficult questions for class counsel and the Court.

3. **Requisite Skill**

This guideline is directed to the observation by the Court of the work product, preparation and general ability of counsel. The Court has had ample opportunity to evaluate counsel's representation of Plaintiff class. Management of this case required significant skill, and the level of performance by Plaintiff class counsel has been superior. The case was hard fought and representation for the Government was also excellent.

4. **Preclusion of Other Employment**

It is beyond debate that the hours spent by counsel on behalf of this Plaintiff class has consumed time which could otherwise have been devoted to clients willing and able to provide immediate compensation. This Court personally and judicially knows, that Plaintiff class counsel specializes in a "federal practice," limiting most of the matters in his professional career to federal cases, civil and criminal, both trial and appellate. Often, those matters are complex. Since September, 1978, the Plaintiff class counsel has not been forclosed from representing other clients, but, for the number of hours devoted to this case, has been precluded from billing those hours on a regular basis to other clients. Plaintiff class counsel's resume shows he has an active professional life and that the time devoted to this case could have been devoted to other clients. A substantial portion of the Plaintiff class counsel's fee income is generated by the pre-payment of agreed-on fees or fees

billed at an hourly rate, with billings submitted and paid on a regular basis.

5. Customary Fee

This factor addresses the customary fee for similar work in the community where the litigation occurs. *Johnson,* 488 F.2d at 718. In determining fees for protracted cases such as this, the courts generally apply the prevailing rates at the end of the litigation when fees are assessed. *Copper Liquor, Inc. v. Adolph Coors Co.,* 684 F.2d 1087, 1096 n. 26 (5th Cir. 1982), citing *E. Larson, Federal Court Awards of Attorney's Fees,* 206--209 (1981). This approach provides a means of at least partially compensating counsel for inflation and delay in receipt of payment. The Court adopts that rule here. The Court has determined current rates on the basis of the affidavits of disinterested parties and by its own conditional knowledge. *Pugh v. Rainwater,* 465 F.Supp. 41, 45 (S.D. Fla. 1979).

In a recent case involving representation of a class of refugee Haitians, where the issues were probably less complex, an award of $300,000.00 to Plaintiffs' counsel was entered. The instant fee award appears particularly reasonable when compared with fee awards in similarly complex cases. See generally 3H. Newberg, *Newberg on Class Actions,* §7025 at 1308–1327 (1977). Dividing the award of fees by the hours expended by Plaintiff class counsel yields an hourly rate of $43.69, only a small fraction of Plaintiff class counsel's earning capacity.

6. Whether the Fee is Fixed or Contingent

Counsel herein have always understood that their fees on the AMO and FLSA portions of the case were contingent upon prevailing, and that the sole basis for reimbursement on this portion of the case would be the results obtained as evaluated by this Court. The courts have recognized that counsel who undertake lengthy litigation on the basis of a contigency fee agreement or a court-awarded fee basis incur substantial risks. Their willingness to suffer non-payment over long durations is a factor which reasonably deserves compensation in the fee award. See *Lindsay Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 117 (3rd Cir. 1976); *Northeastern Telephone Company v. American Telephone & Telegraph Company*, 497 F.Supp., 230 252 (D. Conn. 1980), *reversed on other grounds*, 651 F.2d 76 (2nd Cir. 1981) (antitrust lode star increase 30% for contingency risks); *Jezarian v. Csapo*, 483 F.Supp. 385 (S.D.N.Y. 1979) (securities common fund, lode star increase by factors of 2.0 and 1.5 for contingency risks); *In re: Coordinated Pre-trial Proceedings in Antibiotic Antitrust Actions*, 410 F.Supp. 680 (D. Minn. 1975) (antitrust common fund, multipliers of 2.0 and 2.5 for contingency).

7. Time Limitations Imposed by Client or Circumstances.

The nature of the client, a class consisting of 35 persons, has demanded an enormous amount of counsel's time, particularly in the area of document discovery, review and analysis. The number of docket entries between April, 1977 and May, 1984, although

numerous, do not reveal in the slightest the amount of work effort required to comprehend each category of documents, and then grasp the interrelationship between the documents and the four levels of statutes, rules, orders, instructions or guidelines, directives and messages, all constituting "rules and regulations" of the defendant. Throughout that vast work effort, the Plaintiff class counsel maintained a quality of the work executed on behalf of the Plaintiff class of a consistently thorough, first-rate and superior nature.

8. **Amount Involved and Results Obtained**

The Plaintiff class counsel have worked their way to a final judgment providing substantial cash and other tangible benefits of the Plaintiff class. In addition, and as previously noted the Court's order and judgment may affect, indirectly, somewhere between a quarter of a million and three hundred thousand federal employees nationwide henceforth. The attorneys' accomplishment for the Plaintiff class and perhaps others to be benefited by these proceedings, has been substantial.

The courts and commentators have suggested a large number of issues which, depending upon the particular case, should be considered in evaluating the results and risks of litigation, of which the Court finds the following to be applicable to this issue:

a. The benefit conferred upon the class. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F.Supp. 258 (M.D. Pa. 1965), *vacated on other grounds*, 377 F.2d 776 (3rd Cir. 1967), *aff'd in part and rev'd in part*, 392 U.S. 481 (1968).

b. The effect of parallel government proceedings or prior legal precedents. *Id.*

c. The probability of the Defendant's liability. *Linday Bros. Bldrs. Inc. v. American Radiator & Standard Sanitary Corps.*, 540 F.2d 102, 117 (3rd Cir. 1976).

d. The ease of difficulty in proof of damages. *Id.*

e. The amount of out-of-pocket costs advanced. *Id.*

f. Delay in receipt of payment for services rendered. *Id.*

g. The difficulty and accomplishments of pretrial discovery. 3 *Newberg, supra,* §6915a at 1128–30.

h. The vigor and quality of the defense. *Id.*

(a) **The Benefits Conferred Upon the Class**

In estimating the benefits conferred upon the class, it is proper to consider monetary benefits, which is the amount of recovery obtained and/or savings achieved, and non-monetary benefits. 3 *Newberg, supra,* at 1128.

In this case the benefits to the class from the judgment are substantial. The amounts requested when viewed in terms of the benefits conferred are reasonable and fair.

(b) **The Effect of Parallel Government Proceedings and Prior Legal Precedents.**

Many of the Plaintiff's claims have suffered from the absence of precedent. The absence of precedent has, if anything, increased the risk of failure, which increased risk should figure into the fee calculation. *See Rosenfeld v. Black,* 56 F.R.D. 604 (S.D.N.Y. 1972); *Arenson v. Bd. of Trade of City of Chicago, supra,* 372 F. Supp. at 1354.

(c) **The Probability of Defendants' Liability**

The Court must conclude that this was burdensome in view of the vast amounts of document discovery which had to be analyzed.

(d) **The Difficulty of Proving Damages.**

The Plaintiffs' damages would be no more than a matter of mathematical calculations.

(e) **Out-of-Pocket Costs Advanced.**

The figure to date exceeds thousands of dollars.

(f) **Delay in Receipt of Payment.**

This is self-evident.

(g) **Difficulty and Accomplishments of Pre-Trial Discovery.**

Plaintiff's pre-trial discovery has been extensive, accounting for hundreds of hours in time and two trips to Washington, D.C. and McClean, Va.

(h) **The Vigor and Quality of the Defense**

Defendant was represented by the best available attorneys whose efforts herein have been unrelenting and of excellent substantive quality.

(i) **Summary of Findings as to Money Involved and Results Obtained**

In reviewing the record, the Court finds the amount involved in this matter to have been substantial, with the same true as to the results obtained. The Court further notes that the amount of out-of-pocket costs have been borne by counsel for Plaintiffs to date. Satisfactory evidence of costs was offered without objection. The Court notes that there has been a significant delay in receipt of payment for these costs which have been advanced.

In summary, the Court concludes that counsel for Plaintiffs were confronted with a difficult case, with highly skilled adversaries and managed to achieve results for the class which this Court has already categorized as substantial but fair, reasonable and adequate.

9. **Experience, Reputation, and Ability of Attorney**

Plaintiff counsel's affidavit and resume were unchallenged. They demonstrate the heavy emphasis on federal practice initiated by his certification in 1968 as Judge Advocate General of the United States Marine Corps., his certification as the youngest Military Judge j.g. on August 1, 1969, his appointment as a teacher at

the Naval Justice School, United States Naval Base, Newport, Rhode Island, his tenure as an Assistant United States Attorney for the Southern District of Florida and his continued specialty in federal litigation, as aforesaid.

10. **Undesirability of the Case**

The enormity of the work effort, the limitless resources of the defendant adversary, and the sheer duration of these proceedings should qualify this case as undesirable. Notwithstanding this, however, counsel for the class have not suffered any adverse economic impact as result of the case's undesirability, except based upon their foregoing other immediately compensable work in favor of advancing their clients' cause in these proceedings. In addition, class counsel have been required to advance a significant amount of money for litigation costs. This alone, *per se,* should make the case undesirable for most attorneys.

11. **Nature and Length of Professional Relationship**

This representation was the first time that class counsel have acted as class action counsel for the Plaintiffs or as individual counsel for any of the members of the Plaintiff Class.

12. **Awards in Similar Cases**

There is no case substantially similar to this. Awards in antitrust actions, perhaps the closest genre of complex litigation to this case, in the past three years,

have been diverse. See *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980) (non-contingent fee for senior attorneys up to $90.00 per hour); technical *Learning Collective, Inc. v. Daimler-Benz A.G.*, 1981 Trade CAS. ¶64, 146 (D.Md. 1981) (non-contingent attorney's fee up to $130 per hour); *Axelrod v. Saks & Company,* 1980–81 Trade Cas. ¶63, 861 (E.D. Pa. 1981) (non-contingent attorney's fees up to $250 per hour); *Haitian Refugee Litigation,* Case No. 79-2086-Civ-JLK (S.D. Fla. 1984).

Examining the awards in other cases nationwide is only instructive, however, since this Court's primary criteria are fairness and enabling "litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition. . . ." *Johnson* 488 F.2d at 719; *Pugh v. Rainwater,* 465 F.Supp. at 41, 46. The award of attorney's fees sought by the Plaintiff class counsel in this case satisfies the standard of fairness and reasonableness and is well within the prevailing range, both locally and nationwide.

IV.

THE IMPACT OF *HENSLEY v. ECKERHART*

In *Hensley* the Supreme Court commented on certain factors to be considered in awarding fees in class actions.

Pursuant to *Hensley,* the Court makes the following findings: (1) the hours spent and rates claimed by class counsel have been documented sufficiently; (2) all claims asserted against the defendants grew out of a single nucleus of fact and therefore are closely related; (3) all

of Plaintiffs' claims were directed at the same goals: securing the proper payment of and calculation for payments for overtime worked by federal employees considering the interaction of two separate statutes, the Federal Employee Pay Act in Title 5, *United States Code*, and the FLSA in Title 29, *United States Code* and (4) all of class counsel's efforts contributed to the ultimate achievement of all three of these goals.

Based on the record as a whole, the voluminous filings in connection with the petition for fees and costs, and the submissions and hearings held in connection with this case, this Court finds that the relief obtained by class counsel amply justified the expenditure of the 912.149 hours of attorney time for which they seek compensation.

In awarding fees in the amount of Thirty-Nine Thousand Eight Hundred Fifty Dollars ($39,850.00) this Court concludes that the sum awarded falls within the category of fees approved in *Hensley,* namely, "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Id.* at 430 n.4. It is therefore

ORDERED AND ADJUDGED that defendant pay to class counsel the amount of Thirty-nine thousand Eight Hundred Fifty Dollars ($39,850.00) for attorneys' fees; that Defendant pay the amount of Thirteen Thousand Six Hundred Seventy-Two and 20/100 ($13,672.20) as the additional FLSA premium, accrued interest and ($4,945.52, $3,876.34 and $4,945.52, respectively); and that the Defendant pay to class of Plaintiffs for their costs disbursed through January 12, 1985 the amount of Four Thousand Eight Hundred

Twenty-Eight and 90/100 Dollars ($4,828.90) as allowed expenses and costs in this matter.

DONE AND ORDERED at the United States Courthouse, Miami, Dade County, Florida this 6th day of March 1985.

/s/ Wm. M. Hoeveler
UNITED STATES DISTRICT JUDGE

cc: Kenneth Holecko, Esq.
Arthur W. Tifford, Esq.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No.: 77-1242-Civ-WMH

ALBERT SLUGOCKI, etc., et a.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendants.

FINAL JUDGMENT

Pursuant to Rule 58, *Federal Rules of Civil Procedure,* final judgment is hereby entered in this cause in accordance with the Memorandum Order with Findings of Fact and Conclusions of Law entered April 2, 1984 and the Memorandum Order Awarding Liquidated Damages, Prejudgment Interest, Attorneys' Fees and Costs and Expenses entered March 6th, 1985 as follows:

1. The Plaintiff class shall take from the Defendant damages on the claim for what has been termed in these proceed as the "administratively uncontrollable overtime" claim the sum of Two Hundred Five Thousand Two Hundred Forty-Four and 12/100

($205,244.12) Dollars, to bear interest from the date of this judgment.

2. The Plaintiff class shall take from the Defendant damages on the claim for what has been termed in these proceeding as the "Fair Labor Standards Act" claim the sum of Thirteen Thousand Six Hundred Seventy-Two and 20/100 ($13,672.20) Dollars, consisting of Four Thousand Nine Hundred Forty-five and 52/100 ($4,945.52) Dollars unpaid Fair Labor Standards Act premium, Three Thousand Seven Hundred Eighty-one and 16/100 ($3,781.16) Dollars prejudgment interest thereon, and Four Thousand Nine Hundred Forty-five and 52/100 ($4,945.52) Dollars, liquidated damages, to bear interest from the date of this judgment.

3. The Plaintiff class shall take from the Defendant as the costs and expenses of these proceedings allowed by the Court the sum of Four Thousand Eight Hundred Twenty-Eight and 90 /100 ($4,828.90) Dollars, to bear interest from the date of this judgment.

4. The Defendant shall pay to the Plaintiff class counsel the sum of Thirty-Nine Thousand Eight Hundred Fifty ($39,850.00) Dollars as the reasonable attorney's fees taxed against the Defendant pursuant to Title 29, *United States Code,* §216, to bear interest from the date of this judgment.

All of the foregoing for a final judgment of Two Hundred Sixty-three Thousand Five Hundred Ninety-five and 22/100 ($263,595.22) Dollars. It is the

FURTHER JUDGMENT of this Court that the Defendant, henceforth, shall calculate the regular rate

of pay of its employees subject to Fair Labor Standards Act overtime payments consistent with this Court's memorandum order entered April 2, 1984 and rendered final hereby.

The Clerk of this Court is hereby directed to record this Final Judgment; and let execution issue.

DONE AND ORDERED at the United States Courthouse, Miami, Dade County, Florida this 6th day of March, 1985.

/s/ Wm. M. Hoeveler
DISTRICT COURT JUDGE

cc: Arthur W. Tifford, Esq.
Attorney for Plaintiff class
Honorable Kenneth Holecko
Counsel, U.S. Marshal Service
Honorable Lucille Cirano
Counsel, U.S. Marshal Service
United States Attorney
S. District of Florida

APPENDIX D

[FILED JUL -3 1985]

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 77-1242-Civ-HOEVELER

ALBERT SLUGOCKI, etc., et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

AMENDED FINAL JUDGMENT

Pursuant to Rule 58, *Federal Rules of Civil Procedure,* amended final judgment is hereby entered in this cause in accordance with the Memorandum Order with Findings of Fact and Conclusions of Law entered April 2, 1984, the Memorandum Order Awarding Liquidated Damages, Prejudgment Interest, Attorney's Fees and Costs and Expenses entered March 6, 1985, and the amendment thereto disallowing prejudgment interest entered on the 3rd day of July, 1985, as follows:

1. The Plaintiff class shall take from the Defendant damages on the claim for what has been termed in these

proceedings as the "administratively uncontrollable overtime" claims for the sum of Two Hundred Five Thousand Two Hundred Forty-Four and 12/100 ($205,244.12) Dollars, to bear interest as provided by law.

2. The Plaintiff class shall take from the Defendant damages on the claim for what has been termed in these proceedings as the "Fair Labor Standards Act" claim the sum of Nine Thousand Eight Hundred Ninety-one and 04/100 ($9,891.04) Dollars, consisting of Four Thousand Nine Hundred Forty-Five and 52/100 ($4,945.52) Dollars unpaid Fair Labor Standards Act premium and Four Thousand Nine Hundred Forty-five and 52/100 ($4,945.52) Dollars liquidated damages, to bear interest as provided by law.

3. The Plaintiff class shall take from the Defendant as the costs and expenses of these proceedings allowed by the Court the sum of Four Thousand Eight Hundred Twenty-Eight and 90/100 ($4,828.90) Dollars, to bear interest as provided by law.

4. The Defendant shall pay to the Plaintiff class counsel the sum of Thirty-nine Thousand Eight Hundred Fifty ($39,850.00) Dollars as the reasonable attorney's fees taxed against the Defendant pursuant to Title 29, *United States Code,* Section 216, to bear interest as provided by law.

All of the foregoing for a final judgment of Two Hundred Fifty-nine Thousand Eight Hundred Fourteen and 06/100 ($259,814.06) Dollars. It is the

FURTHER JUDGMENT of this Court that the Defendant, henceforth, shall calculate the regular rate of pay of its employees subject to Fair Labor Standards Act overtime payments consistent with this Court's memorandum order entered April 2, 1984 and rendered final hereby.

The Clerk of this Court is hereby directed to record this Final Judgment and let execution issue.

DONE AND ORDERED at the United States Courthouse, Miami, Dade County, Florida this 3rd day of July, 1985.

/s/ Wm. M. Hoeveler
UNITED STATES DISTRICT JUDGE

cc: Arthur W. Tifford, Esq.
Attorney for Plaintiff class
Honorable Kenneth Holecko, Esq.
counsel, U.S. Marshal Service
Honorable Lucille Cirano
Counsel, U.S. Marshal Service
United States Attorney
So. District of Florida

APPENDIX E

United States Court of Appeals for the Federal Circuit

Appeal Nos. 85-2824 and 86-709

ALBERT SLUGOCKI, ET AL.,

Appellees/Cross-Appellants,

v.

THE UNITED STATES, ET AL.,

Appellants/Cross-Appellees.

DECIDED: April 22, 1987

Before FRIEDMAN, NEWMAN AND ARCHER, *Circuit Judges.*

ARCHER, *Circuit Judge.*

Appellees, 35 Deputy United States Marshals, brought this class action in the United States District Court for the Southern District of Florida, asserting various claims concerning their overtime compensation.[1] The district court held, *inter alia,* (1) that appellees were entitled to be paid overtime pay under

[1]The parties agree that the district court had jurisdiction over appellees' claims under 28 U.S.C. §1346 (a)(2) (1982) (the Little Tucker Act), on the basis that the amount claimed by any individual plaintiff did not exceed $10,000. This court has jurisdiction on appeal under 28 U.S.C. §1295(a)(2) (1982).

5 U.S.C. §5542 for a portion of the hours for which they had been paid administratively unscheduled overtime under 5 U.S.C. §5545(c)(2), (2) that the formula used for computing the amount of appellees' overtime pay under the Fair Labor Standards Act[2] violated the requirements of that Act, and (3) that appellees were entitled to an award of attorneys' fees under the Fair Labor Standards Act. Both parties appealed.[3] We affirm in part, reverse in part, vacate in part and remand.

BACKGROUND

Appellees were Deputy United States Marshals (DUSMs) in the Southern District of Florida between 1971 and 1978. During that time, their regular workweek was 40 hours, consisting of five eight-hour workdays, Monday through Friday. Their duties included eight major categories of work: (1) serving writs, summonses and other papers; (2) serving and investigating warrants; (3) morning prisoner pick-up for court attendance; (4) prisoner return either in the afternoon or at the end of the day; (5) courtroom duty; (6) prisoner coordinator trips; (7) special assignments, consisting of protecting witnesses, protecting judges, and supervising jury sequestration; and (8) a general category, "other." As a result of an increasing workload and shortage of manpower, they were required to regularly work substantial amounts of overtime.

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[2]Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§201-19 (1982).

[3]Although appellees appealed from the judgment, they have raised no issues other than those presented by their response to the Government's arguments.

When appellees worked beyond their regularly scheduled 40-hour workweek, Title 5 of the United States Code authorized additional pay pursuant to two sections. For overtime work which management considered to be administratively uncontrollable, the head of the agency could approve pay under 5 U.C.S. §5545(c)(2),[4] which provides:

> (c) The head of an agency, with the approval of the Office of Personnel Management may provide that—
>
> * * *
>
> (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, *except for regularly scheduled overtime*, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 percent nor more than 25

[4]This form of compensation, designated administratively unscheduled overtime (AUO), was eliminated with respect to DUSMs on October 21 1978.

> percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position. (Emphasis added.)

Appellees received this form of compensation for overtime work throughout substantially all the period at issue.

For all work in excess of 40 hours which management considered to be "officially ordered and approved" and administratively controllable, Title 5 provides in §5542 that:

> [H]ours of work officially ordered or approved in excess of 40 hours in an administrative workweek, . . . shall be paid for, except as otherwise provided by this subchapter, at the following rates:
>
> (1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.
>
> (2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and

> one-half times the hourly rate of the minimum rate of basic pay for GS-10, and all that amount is premium pay.

Thus, Title 5 authorized "independent, mutually exclusive methods for compensating [employees for] two distinct forms of overtime work." *Burich v. United States,* 366 F.2d 984 (Ct. Cl. 1966). While the statute did not preclude employees from receiving regular overtime pay under §5542 in addition to AUO pay under §5545(c)(2), employees could not claim both for the same work. *Id.* at 987.

On January 1, 1975, appellees also became entitled to overtime pay pursuant to the Fair Labor Standards Act (FLSA or Act).[5] The FLSA and Title 5 were applied separately in determining overtime pay entitlements, with employees' pay reflecting the greater of the amounts computed by the separate laws. *See Zumerling v. Devine,* 769 F.2d 745, 747 (Fed. Cir. 1985). Under §7(a) of the FLSA, 29 U.S.C. §207(a), employees were entitled, in the absence of certain exceptions, to receive overtime compensation at a rate of one and one-half times their "regular rate." Section 7(k), 29 U.S.C. §207(k), however, created an exception for Government employees engaged in fire protection and law enforcement activities. That section originally provided that:

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[5]The Act established a statutory minimum wage and overtime rate for work in excess of a prescribed maximum number of hours per day and per workweek. The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, made the Government subject to the Act as an employer and provided that the Civil Service Commission (now the Office of Personnel Management or OPM) would be responsible for administering the Act with respect to most Government employees. 29 U.S.C. §203 (1982).

> (k) No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities . . . if—
>
> > (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or
> >
> > (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours to 28 days,
>
> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

On January 1, 1976, "240 hours" was reduced to "232 hours" and, on January 1, 1977, "232 hours" was reduced to "216 hours." *Alexander v. United States,* 1 Cl. Ct. 653, 655 (1983). In computing appellees' FLSA overtime pay, the Marshals Service utilized the formula established by the former Civil Service Commission in Federal Personnel Manual (FPM) Letter 551-5,[6] which

[6]Current OPM guidelines for computing overtime pay for law enforcement employees are consistent with FPM Letter 551-5 and are found at 5 C.F.R. §§551.501–.541 (1986.)

included AUO premium pay and AUO hours worked in determining the "regular rate" of pay. This method of computation (hereinafter referred to as the OPM formula) resulted in appellees often being paid less per hour for overtime hours worked than their basic rate of pay per hour for non-overtime work.

Appellee Slugocki filed his complaint on March 14, 1977, alleging that he was entitled to overtime pay pursuant to 5 U.S.C. §5542 for all hours for which he had received AUO pay. His motion for class certification was granted on December 27, 1977. On March 15, 1979, appellees filed an amended complaint, alleging that the government violated the FLSA by utilizing the OPM formula to compute their FLSA entitlements.

On April 2, 1984, the district court issued a memorandum opinion holding, *inter alia*, (1) that certain AUO work could have been administratively scheduled in advance and should have been paid for as provided in 5 U.S.C. §5542 instead of being compensated as a part of AUO pursuant to 5 U.S.C. §5545(c)(2), and (2) that the OPM formula was invalid because it included AUO in the compensation of "regular rate" of pay. In a subsequent memorandum opinion, the district court determined that appellees were entitled to an award of liquidated damages, interest, costs, and attorneys' fees. Specific monetary awards were set forth in the court's final judgment dated March 6, 1985, which was amended on July 3, 1985 with respect to the award of interest. The Government in its appeal of the district court's judgment has raised the issues enumerated below.

ISSUES

1. Whether the district court erred in holding that appellees were entitled to receive overtime pay under 5 U.S.C. §5542 for performing certain duties from 1971 through 1978.

2. Whether the district court erred in holding that the OPM formula for determining FLSA overtime entitlements of federal law enforcement officers violated the FLSA.

3. Whether the district court erred in awarding attorneys' fees to appellees under the FLSA (29 U.S.C. §216(b)) for time expended by appellees' counsel in prosecuting appellees' Title 5 overtime pay claims.

DISCUSSION

A. Scope of Review

This court reviews a district court's findings of fact under the clearly erroneous standard. It reviews a district court's legal conclusions to determine whether they are correct as a matter of law. *Alger v. United States,* 741 F.2d 391, 393 (Fed. Cir. 1984); *Heisig v. United States,* 719 F.2d 1153, 1158 (Fed. Cir. 1983).

B. Title 5 Overtime Pay

The Government contends that the district court failed to analyze appellees' claims of entitlement to overtime pay under 5 U.S.C. §5542 in a manner consistent with precedent binding on this court. It

argues that the district court first should have determined whether "OPM properly approved the payment of AUO to plaintiffs," and, if so, whether any of the hours of overtime work performed by appellees were "regularly scheduled." It defines "regularly scheduled" to mean "compliance with criteria in the regulation for procedural regularity," citing *Bennett*, 4 Cl. Ct. at 341. By this it apparently means that full compliance with the agency's regulatory requirements for scheduling and authorizing overtime must be shown. The Government concedes that if hours of "regularly scheduled" overtime duty are authorized in this manner, appellees would be entitled to overtime pay for those hours under §5542.

Appellees respond that the district court's analysis was consistent with prior decisions. They maintain that there was no dispute as to OPM's authorization of AUO pay for DUSMs, and that, therefore, the district court properly proceeded immediately to consideration of whether any of the hours of appellees' overtime duty could have been "regularly scheduled." They argue that the district court's specific findings support its conclusion that certain overtime hours worked by appellees were "administratively controllable, regularly occurring, and known in advance to be required," and thus compensable under §5542.

The Government relies primarily on *Bennett v. United States*, 4 Cl. Ct. 330 (1984), a Claim Court decision. That case is clearly distinguishable from the case before us, and, in any event, is not precedent binding upon this court. In *Bennett*, the plaintiffs contended that "inclusion of the deputy marshall position in the list of Department of Justice

organizations eligible for AUO was invalid under the statutory and regulatory criteria," 4 Ct. Cl. at 337, and "that all their AUO hours should be treated as "regularly scheduled." Appellees here do not contend that they were ineligible for AUO pay in that some of their overtime hours could not have been administratively controlled. Thus, the relevant question, and the one addressed by the district court, was whether any of the appellees' hours of overtime duty could have been "regularly scheduled" or administratively controlled.

In *Bennett* the D.C. Marshals Office was "fairly and equitably" staffed, whereas in the present case the court found a chronic shortage of manpower to be the principal factor accounting for the overwhelming portion of overtime work. This finding led the district court to conclude that certain duties performed by the appellees "could have been administratively controlled by the hiring of additional personnel or the rescheduling of relevant duty hours."[7] In support of that conclusion, the district court found, among other things, that prisoner coordination trips, which constituted almost 50% of the total disputed overtime hours, were almost exclusively reserved for weekends because of the shortage of manpower. It also noted the testimony of the marshal for the district and his supervisory DUSM that had his office been authorized to schedule a two shift day, they would have done so. This rescheduling, in the district

[7]It is noteworthy that as a regular practice the D.C. office treated some DUSM overtime duties comparable to the duties in the instant case, *e.g.* prisoner transportation and coordination trips and special assignments, at least in part as regularly scheduled overtime compensable under 5 U.S.C. §5542. *Bennett*, 4 Cl. Ct. at 336, 344.

court's opinion, "would have eliminated virtually all of the overtime generated through early morning prisoner pick-ups." Finally, the court noted that overtime generated by certain specific categories of appellees' duties (service of process and other court writs and warrants, early morning prisoner pick-ups, prisoner coordination trips, special assignments and "other" work consisting primarily of weekly staff conferences) was "routinely required to be worked and was demanded of the plaintiffs on a constant and on-going basis. Such was therefore 'recurrent.' " The court concluded that these recurrent duties, which did not entail work where "the employee [is] generally responsible for recognizing, without supervision, circumstances which require him to remain on duty," were susceptible of scheduling. See 5 U.S.C. §5545(c)(2).

We agree with appellees that the Government has not shown the district court's findings on this issue to be clearly erroneous or its conclusions to be incorrect as a matter of law. Furthermore, we discern no conflict with prior Court of Claims decisions cited by the Government. That court granted recovery to meat inspectors in *Aviles v. United States,* 151 Ct. Cl. 1 (1960), because it found that the overtime work at issue, due to its "habitual and recurrent nature," could have been formally scheduled.

In *Burich v. United States,* 366 F.2d 984, 988-89 (Ct. Cl. 1966), however, the Court of Claims concluded that a California DUSM's additional duty hours represented AUO hours rather than regularly scheduled overtime. The plaintiff in *Burich,* in contrast to *Aviles* and the present case, experienced "erratic and irregular" periods of overtime. Although his assignments were

received on a daily basis, "neither the nature of the work nor the length of time required in its performance could be ascertained beforehand." Thus, in *Burich* it was not contended that these hours were amenable to administrative control by devices such as hiring additional personnel or rescheduling the hours of duty, which the district court held would be effective in the present case in eliminating overtime. 5 C.F.R. §550.153(a).

Subsequent to *Aviles* and *Burich*, overtime work by nursing assistants at a Veterans Administration Hospital was held by the Court of Claims to be irregular and occasional in *Anderson v. United States*, 201 Ct. Cl. 660 (1973), despite the fact that the work was performed with daily regularity over a three year period. The hospital director in *Anderson*, unlike the supervisors in *Aviles* and in the case before us, had no authority under agency regulations to order or approve regularly scheduled overtime, but only had authority to approve irregular overtime. Despite this limitation on his authority, he nevertheless "tacitly approved" instructions requiring the performance of overtime work on a recurrent basis. *Id.* at 660. The Government argued in *Anderson* that the overtime was "regular" because it was performed every day and that it was, therefore, unauthorized and not compensable. The Court of Claims concluded, however, that equity required "that the natural consequence should be drawn from defendant's failure to schedule the overtime as its own regulation required: it was not regularly scheduled, therefore it was irregular overtime and could be ordered locally." 201 Ct. Cl. at 666.

The Government now cites *Anderson* as establishing that regularly scheduled overtime work is overtime work that is "regularly prescribed according to the statutes and regulations applicable," 201 Ct. Cl. 665. In a subsequent order in *Anderson*, the court expressly stated that its decision turned on "the wording and context of the particular Veterans Administration regulation. . . . The court was not construing 'regular overtime work' or 'irregular or occasional overtime work' as those terms [might] appear in other regulations or legislation, or in other contexts." *Anderson v. United States*, 202 Ct. Cl. 1120 (Fed. Cir. 1973) (order denying motion for reconsideration or alteration of the court's judgment). *Anderson*, therefore, is inapposite to the instant case and is not inconsistent with the Court of Claims' earlier decision in the *Aviles* case. For the foregoing reasons, we discern no error in the district court's decision regarding appellees' Title 5 claims.[8]

C. Computation of FLSA Overtime Pay

The Government contends the district court erred in holding OPM's formula invalid for violating section

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[8]Appellees have moved to strike from the record the Government's request for relief in the form of a remand for a determination of specific hours worked by appellees in which they were entitled to be compensated at the regular overtime rate rather than by AUO. The motion is moot in view of the Government's response indicating that it was requesting this relief only in the event we reversed the district court's decision on appellees' Title 5 claims. In any event, appellees here, unlike those in *Bennett*, established to the satisfaction of the district court that certain categories of their duties could have and should have been formally scheduled, rendering those duties compensable at regular overtime rates under 5 U.S.C. §5542.

7(k) of the FLSA, 29 U.S.C. §207(k), "by allowing overtime payments of less than the statutorily mandated rate for non-overtime work." It argues that the district court's decision is contrary to this court's holding in *Zumerling* that OPM properly applied §7(k) of the FLSA in formulating its equation for the calculation of overtime payments for federal fire fighters and law enforcement officers. Appellees attempt to distinguish *Zumerling* on the basis that it dealt with standby pay under 5 U.S.C. §5545(c)(1) and not AUO pay under 5 U.S.C. §5545(c)(2). Although they acknowledge this court's approval of *Alexander v. United States*, 1 Cl. Ct. 653 (1983), a Claims Court decision dealing with AUO pay which was cited in *Zumerling*, appellees argue that the Claims Court's reliance in the *Alexander* case on FPM Letter 551-5 and Department of Labor regulations found at 29 C.F.R. §§778.308 and 778.310 was "inappropriate due to the concise language in [29 C.F.R. §§] 778.202(b) and (d)." These sections state, respectively, that a true overtime premium [is] to be excluded from the "regular rate" and that "extra compensation provided by . . . [a premium rate for hours worked in excess of a specified daily or weekly standard] will be regarded as a true overtime premium. . . ."

Section 7(e)(5), 29 U.S.C. §207(e)(5), defines "regular rate" of pay. That section has been interpreted by the Secretary of Labor as excluding overtime compensation in the form of a "premium rate paid for certain hours." 29 C.F.R. §§778.200(a)(5), .201(a). Unlike ordinary overtime compensation, however, AUO premium pay is a flat percentage of the employee's basic pay which remains fixed regardless of the number of AUO hours worked in a particular pay period. Thus, it is not paid

for "certain hours." 29 C.F.R. §778.310. Furthermore, AUO pay is neither a "fixed amount per hour" nor a "multiple of the non-overtime rate." Thus, it is not paid at any hourly "rate". *Alexander,* 1 Cl Ct. at 657; 29 C.F.R. §778.308(b); *see Zumerling,* 769 F.2d at 751.52. Since AUO premium pay is neither paid by the hour nor at any hourly rate, we conclude that §§778.202(b) and (d) are inapplicable and that AUO pay does not qualify as an exclusion from the computation of "regular rate."

Although *Zumerling* dealt primarily with standby pay, OPM's formula for determining "regular rate" of pay from which FLSA overtime wages are calculated was "squarely at issue." *Zumerling,* 769 F.2d at 747. This court held that "OPM's administration of the FLSA overtime provisions [was] both reasonable and consistent with the statute, the regulations promulgated by the Secretary of Labor, and the intent of Congress." *Id.* at 749. It also expressed approval of the Claims Court's decision in *Alexander,* which it described as "entirely consistent" with its holding. *Id. Alexander* dealt specifically with AUO pay and held that inclusion of AUO pay received by Customs Service employees in the computation of their "regular rate" was consistent with the requirements of the FLSA. Moreover, one of our predecessor courts, the Court of Claims, held in *Beebe v. United States,* 640 F.2d 1283 (Ct. Cl. 1981), that FPM Letter 551-5 was a proper exercise of authority delegated to OPM and that it was proper for an agency to rely on it in implementing the FLSA provisions. *Zumerling,* 769 F.2d 750. We are bound by the *Zumerling* and *Beebe* decisions and, accordingly, conclude that the district court erred in holding the OPM formula invalid.

D. Attorneys' Fees

The Government contends that the district court erred as a matter of law in awarding attorneys' fees under the FLSA for time expended by appellees' counsel on appellees' Title 5 claims. Appellees maintain, however, that the court's award of attorneys' fees was based upon findings of fact, not shown to be clearly erroneous, which led the district court to conclude that appellees' FLSA and Title 5 claims were too interrelated to be segregated.

The "United States, as sovereign, 'is immune from suit save as it consents to be sued.' " *United States v. Testan,* 424 U.S. 392, 399 (1976), quoting *United States v. Sherwood,* 312 U.S. 584, 586 (1941). Furthermore, the limitations and conditions upon which the Government consents to be sued must be strictly observed. *Soriano v. United States,* 352 U.S. 270, 276 (1957). Thus, in order for attorneys' fees to be awarded against the Government, there must be an express statutory authorization providing for the payment of such fees. *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975). The FLSA provides such authorization in 29 U.S.C. §216(b), which states "the court . . . shall, in addition to any judgment awarded to plaintiff or plaintiffs, allow reasonable attorneys' fees to be paid by the defendant. . . ." Courts held that where an employee prevails on a FLSA claim, the award of attorneys' fees under §216(b) is mandatory. *Beebe v. United States,* 640 F.2d 1283 (Ct. Cl. 1981).

Although the Supreme Court stated in *Hensley v. Eckerhart,* 461 U.S. 424, 453-54 (1982), that the "evaluation of the interrelatedness of several claims

within a single lawsuit, and of the legal work done on these claims is most appropriately a task for the district court that had and decided the case, and is subject to appellate review for abuse of discretion," that case involved different circumstances. Appellees' Title 5 claims fall outside any express statutory waiver of sovereign immunity contained in the FLSA, whereas all of the claims in *Hensley* fell within an express waiver contained in 42 U.S.C. §1988.

Section 216(b) of the FLSA does not authorize an award of attorneys' fees for non-FLSA claims. The court's allowance of attorneys' fees for appellees' Title 5 claims as a part of the FLSA award does not represent strict observance of limitations on the Government's waiver of sovereign immunity. We therefore hold that in making a FLSA attorneys' fee award a reasonable allocation must be made to segregate the work performed by appellees' counsel on any successful claims under the FLSA from the work on Title 5 claims.

We note that appellees apparently requested an award of attorneys' fees under both the FLSA and the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d)(1)(A)(1982). The district court awarded attorneys' fees only under the FLSA provision. Because no issue was raised on appeal as to the propriety of awarding fees under the EAJA, we express no opinion on that issue. In view of our decision, we must remand to the district court to determine the proper FLSA fee award, at which time the appellees may renew their request for EAJA attorneys' fees.

CONCLUSION

The district court's judgment as to appellees' Title 5 claims is affirmed. Its judgment as to the computation of "regular rate" for determining overtime pay under FLSA is reversed. Finally, the district court's award of attorneys' fees is vacated. The case is remanded to the district court (1) to determine appellees' regular rate for purposes of their FLSA overtime pay entitlement, in view of our holding that the OPM formula is valid and our affirmance of the district court's judgment with respect to overtime work compensable under 5 U.S.C. §5542 and (2) to determine on the basis of this opinion the proper amount to be awarded to appellees as attorneys' fees.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED.

United States Court of Appeals for the Federal Circuit

Appeal Nos. 85-2824 and 86-709

ALBERT SLUGOCKI, ET AL.,

Appellees/Cross-Appellants,

v.

THE UNITED STATES, ET AL.,

Appellants/Cross-Appellees.

Arthur W. Tifford, of Miami, Florida, argued for appellees.

Robert A. Reutershan, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C., argued for appellants. With him on the brief were *Richard K. Willard,* Assistant Attorney General, and *David M. Cohen,* Director. Of counsel was *Lucille K. Cirino,* Office of Legal Counsel, U.S. Marshals Service.

Apppealed from: U.S. District Court for the Southern District of Florida

Judge Hoeveler

APPENDIX F

United States Court of Appeals
for the Federal Circuit

Appeal Nos. 85-2824/86-709

ALBERT SLUGOCKI, ET AL.,
Appellees/Cross-Appellants,

v.

THE UNITED STATES, ET AL.,
Appellants/Cross-Appellees.

Judgment

ON APPEAL from the United States District Court for the Southern District of Florida

in CASE NO(S). 77-1242-CIV-WMH

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED.

ENTERED BY ORDER OF THE COURT
/s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

DATED APR 22 1987

ISSUED AS A MANDATE: JUN 18 1987

APPENDIX G

United States Court of Appeals
for the Federal Circuit

Appeal Nos. 85-2824 and 86-709

ALBERT SLUGOCKI, ET AL.,

Appellees/Cross-Appellants,

v.

THE UNITED STATES, ET AL.,

Appellants/Cross-Appellees.

Before FRIEDMAN, NEWMAN and ARCHER,
Circuit Judges.

O R D E R

Upon consideration of appellant's petition for rehearing filed May 12, 1987, IT IS ORDERED AS FOLLOWS:

1. The petition for rehearing is granted to the extent of making the following change in the opinion issued by this court on April 22, 1987:

> On page 9, delete the first two sentences of the first full paragraph and insert in their place:
>
> The Government relies primarily on an order of the Court of Claims, *Bennett v. United*

States, 231 Ct. Cl. 1041 (1982), adopting the August 4, 1982 recommended opinion of Trial Judge Harkins (which is published as an appendix to *Bennett v. United States*, 4 Cl. Ct. 330 (1984)). That decision is clearly distinguishable from the case before us.

2. The opinion issued by this court on April 22, 1987 is modified as indicated above.

FOR THE COURT
/s/ GLENN L. ARCHER, JR.

Glenn L. Archer, Jr.
Circuit Judge

6/1/87
Date

United States Court of Appeals
for the Federal Circuit

Appeal Nos.
85-2824 and 86-709

ALBERT SLUGOCKI, ET AL.,

Appellees/Cross-Appellants,

v.

THE UNITED STATES, ET AL.,

Appellants/Cross-Appellees.

Arthur W. Tifford, of Miami, Florida, argued for appellees.

Robert A. Reutershan, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C., argued for appellants. With him on the brief were *Richard K. Willard*, Assistant Attorney General, and *David M. Cohen*, Director. Of counsel was *Lucille K. Cirino*, Office of Legal Counsel, U.S. Marshals Service.

Appealed from: U.S. District Court for the
Southern District of Florida

Judge Hoeveler

APPENDIX H

CHAPTER 8.—FAIR LABOR STANDARDS

Section 207-216b are included in this Volume

* * *

§207. Maximum hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; and

(2) No employer shall employ any of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 203(s) (1) or (4) of this title, or by an establishment described in section 203(s) (3) of this title, and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this subsection, or (ii) is brought within the purview of this subsection by the amendments made to section 213 of this title by the Fair Labor Standards Amendments of 1961—

(A) for a workweek longer than forty-four hours during the third year from the effective date of the Fair Labor Standards Amendments of 1961,

(B) for a workweek longer than forty-two hours during the fourth year from such date,

(C) for a workweek longer than forty hours after the expiration of the fourth year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

(d) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,) where such premium rate is not less

than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

* * *

(e) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

* * *

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 77-1242-Civ-WMH

ALBERT SLUGOCKI, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Miami, Florida
December 15, 1981
10:00 a.m.

EXCERPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM HOEVELER

TESTIMONY OF DWIGHT BROWN

TRANSCRIPT ORDERED BY:
ARTHUR W. TIFFORD, ESQ.

APPEARANCES:

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* * *

MR. TIFFORD: Only for the eligibility period.

THE COURT: Yes, whatever that is.

MR. TIFFORD: Yes.

THE COURT: Has anybody figured out whether that would get him up to time and a half, conceivably?

THE WITNESS: Basically, an AUO—I have figured that out. In fact, one of the things we did in making a determination for the FLSA purpose, whether AUO meet any of the statutory inclusions of the Fair Labor Standards Act on this side.

The AUO does equate out to approximately straight time or sometimes a little above straight time, and sometimes above straight time, depending on how many hours, because it does fluctuate.

Obviously, if you have a person—if you have a 25 percent rate, 25 percent of 40 hours is 10 hours, so if he works 10 hours, that is exactly straight time he is getting for those 10 hours.

If he works 11 hours, then that hourly rate is going to be somewhat less, 12 hours is a little bit more, if you try to give it an hourly equivalent, but it's not pay by the hour.

MR. TIFFORD: I think the Court might even recall that some of the plaintiff's testimony was to the effect if you add up all the AUO compensation, add that to the base pay, divide that by the number of hours actually worked, in most instances the deputy never got more than their base rate of pay, and in many instances, got less than their base rate of pay.

THE COURT: You mean for the additional hours worked?

MR. TIFFORD: Yes. And—I'm sorry, I got into an argument and I apologize.

THE COURT: Go ahead, Mr. Brown.

THE WITNESS: All I was going to say is AUO, of course, it's paid a lump sum basis and it was enacted back in 1954 as an alternative time of paying time and a half to give a standard level payment every pay period so that the employees had a standard pay.

It doesn't equate to time and a half and it's not intended to pay an annual period paid in a lump sum versus paid by the hour.

THE COURT: But depending on the rates involved, I think what you are saying to me, depending on the rates involved that are applicable in any given period and depending the number of hours work, it could come out to just about straight time.

THE WITNESS: Generally, I would say so, I agree, Counsel, here.

THE COURT: Okay.

* * *

APPENDIX J

United States Department of Justice

(Seal)

Order DOJ 1551.5

FAIR LABOR STANDARDS ACT

Sep. 20, 1976

RECORD OF CHANGES

After removing obsolete pages and filing revised pages, initial and date the block following the change number. Request any missing changes from your distribution point.

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United States Department of Justice

DJ FORM - 176
(Ed. 7-1-71)

FOREWORD

1. *PURPOSE.* This order establishes policy and guidelines for the administration of the overtime pay and minimum wage provisions of the Fair Labor Standards Act in the U.S. Department of Justice.

2. *SCOPE.* This order applies to all employees of the U.S. Department of Justice.

3. *POLICY.* It is the policy of the U.S. Department of Justice that all of its employees shall be paid all overtime pay to which they are entitled under applicable laws and regulations, including the Fair Labor Standards Act.

4. *REFERENCES.* The Fair Labor Standards Amendments of 1974, P.L. 93-259, April 8, 1974; FPM Letters No. 551-1 through 551-8.

/s/ GLEN E. POMMERENING

GLEN E. POMMERENING
Assistant Attorney General
for Administration

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* * *

CHAPTER 3. OVERTIME ENTITLEMENT AND COMPUTATION UNDER THE FLSA.

18. *FLSA vs. OTHER PAY LAWS.* The FLSA does not change anything on overtime entitlements with respect to "exempt" employees; however, "non-exempt" employees, for overtime purposes, beginning May 1, 1974, are covered by two laws. Where the FLSA and other statutes are not consistent, nonexempt employees will receive the greater benefit.

19. *OVERTIME ENTITLEMENT.* Overtime entitlement under the FLSA does not begin to accrue until first the employee has completed 40 hours of actual work in a week. For example, an employee who has any paid time off during the week (holiday, annual leave, sick leave, or any excuted absence with pay) will not accrue any entitlement to overtime pay under the FLSA until additional actual work exceeds the paid hours of nonwork, and is in excess of 40 hours of actual work in the week.

20. *REGULAR RATE OF PAY.*

a. Once it is determined that an employee is entitled to overtime compensation, it is necessary to compute his "regular rate." The FLSA provides that certain types of payments are excluded from the computation of the regular rate, and for Federal employees, "extra" payments for overtime are not only excluded from the computation of the regular rate, but are also creditable against overtime compensation due under the Act.

b. The regular rate is computed by adding up all includable payments made for all hours of actual work for the week, and then dividing by the total hours of actual work. The employee is then entitled to an additional one-half the regular rate for each hour worked beyond 40 hours for the week. The employee is entitled to overtime for fractions of hours, as established by Department policy. This is then added to the first sum, the result of which is the total amount due the employee for the week under the FLSA. This is then compared to what the employee would receive under other applicable pay rules (such as title 5) and the employee is entitled to be paid the greater amount. Thus, two computations will be necessary for certain nonexempt employees. (Several examples are provided in Appendix I to illustrate this procedure.)

c. The following types of payment ARE INCLUDED in computing an employee's regular rate:

(1) Scheduled rate (or basic rate under a statutory pay system).

(2) Night shift differential.

(3) Environmental differentials/hazard pay.

(4) Sunday premium pay.

(5) Cost-of-living allowance.

(6) Tropical differential in the Canal Zone.

(7) Recruitment incentive in Guam.

(8) Post differential.

(9) Representation allowance paid to employees assigned to the United Nations in New York.

d. The following types of payments ARE EXCLUDED in computing an employee's regular rate:

(1) Additional pay for overtime work in excess of eight hours a day or 40 hours per week (e.g., for an employee who works four 10-hour days, count 10 hours per day at straight time).

(2) Payments for periods of nonwork: sick, annual, or other paid leave; holidays (exclude only the extra payment made for not working on the holiday; if an employee works on a holiday, count only the straight time pay).

(3) Cash awards under an incentive awards program.

(4) Travel and per diem expenses; mileage allowance for an employee who travels in his own automobile.

(5) Remote worksite allowance.

(6) Clothing or uniform allowance.

(7) Call-back overtime payments for hours not actually worked (e.g., if an employee is guaranteed two hours' pay for call-back work, but works only one hour, count only the one hour's pay at straight time).

(8) Any other payments which are not for actual hours of employment.

e. The additional 50% payments for overtime are creditable against overtime payments computed under the FLSA.

* * *